No. 89-693

Supreme Court, U.S.
FILED
OCT 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

MARINE TRANSPORT LINES, INC.,

Petitioner,

—vs.—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Of Counsel:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Eric A. Sisco
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Los Angeles, California 90017

D. Michael Underhill
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

Peter N. Popov
Marine Transport Lines, Inc.
150 Meadowland Parkway
Secaucus, New Jersey 07094

October 30, 1989

MICHAEL D. BLECHMAN
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel of Record and Attorney for Petitioner Marine Transport Lines, Inc.

QUESTION PRESENTED

Whether the decisions below conflict with basic principles of federal labor policy and contract interpretation, as well as with prior decisions of the United States Supreme Court and other federal courts of appeals, in:

(a) finding that the duration of a written collective bargaining agreement was extended orally, even though there was no express oral agreement to extend, the subject of an extension was not even discussed and there is no basis for finding that such an extension must be necessarily implied;

(b) holding that evidence of the parties' pre-litigation understanding that the collective bargaining agreement had not been extended is irrelevant as a matter of law; and

(c) holding that the burden of proof may be reversed, so that an agreement to extend the collective bargaining agreement may be found based on the very absence of evidence that the subject of an extension was ever discussed?

LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were petitioner Marine Transport Lines, Inc. and respondent International Organization of Masters, Mates & Pilots.

Pursuant to Supreme Court Rule 28.1, petitioner hereby states that its parent company is Marine Transport Lines, Inc., and that it has no subsidiaries or affiliates except wholly-owned subsidiaries.

TABLE OF CONTENTS

	PAGE
QUESTION PRESENTED	i
LIST OF PARTIES AND RULE 28.1 LIST	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
STATEMENT OF THE CASE	2
A. Statement of Facts	3
B. Prior Proceedings	6
REASONS FOR GRANTING THE WRIT	7
I. THE HOLDING BELOW, THAT THE DURATION OF A WRITTEN COLLECTIVE BARGAINING AGREEMENT MAY BE FOUND TO HAVE BEEN EXTENDED ORALLY WITHOUT ANY EXPRESS AGREEMENT TO THAT EFFECT, DEPARTS FROM BASIC PRINCIPLES OF LABOR LAW AND CONTRACTUAL INTERPRETATION AND CONFLICTS DIRECTLY WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS	7

PAGE

II. THE HOLDING BELOW, THAT EVIDENCE OF THE PARTIES' PRE-LITIGATION INTERPRETATION OF THEIR COLLECTIVE BARGAINING AGREEMENT IS IRRELEVANT AS A MATTER OF LAW, CONFLICTS WITH SUPREME COURT PRECEDENT AND THE LAW OF OTHER CIRCUITS 12

III. THE HOLDING BELOW, REVERSING THE BURDEN OF PROOF, IS INCONSISTENT WITH FUNDAMENTAL PRECEPTS OF OUR LEGAL SYSTEM AND WITH THE LAW OF OTHER FEDERAL COURTS OF APPEALS 15

CONCLUSION 17

APPENDICES:

Appendix A: Order And Opinion of the United States Court of Appeals for the Second Circuit (June 13, 1989) A-1

Appendix B: Opinion and Order of the United States District Court for the Southern District of New York (Conboy, J.) (September 29, 1988) B-1

Appendix C: Judgment of the United States Court of Appeals for the Second Circuit (originally entered, June 13, 1989; corrected and re-entered, October 20, 1989) C-1

Appendix D: Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing and suggestion for rehearing in banc (July 31, 1989) D-1

TABLE OF AUTHORITIES

Cases: PAGE

Boldt v. International Union, UAW, 482 F.2d 985 (Temp. Emer. Ct. App. 1973) 11

Cordingly v. Allied Van Lines, Inc., 563 F.2d 960 (9th Cir. 1977) 14

Genesco, Inc. v. Joint Council 13, United Shoeworkers of America, 341 F.2d 482 (2d Cir. 1965) 8

Gloeckner v. School Dist. of Baldwin, 405 Pa. 197, 175 A.2d 73 (1961) 9, 10n

Greater Kansas City Labor Pension Fund v. B.E.A.M., Inc., 754 F.2d 297 (8th Cir. 1985) 9

H.C. Lawton, Jr., Inc. v. Truck Drivers, Chauffeurs & Helpers Local Union No. 384, 755 F.2d 324 (3d Cir. 1985) 8

Heheman v. E.W. Scripps Co., 661 F.2d 1115 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982) 11

Irwin v. Carpenters Health and Welfare Trust Fund for California, 745 F.2d 553 (9th Cir. 1984) 8

Lerwill v. Inflight Services, Inc., 379 F. Supp. 690 (N.D. Cal. 1974), *aff'd*, 582 F.2d 507 (9th Cir. 1978) 9n

Linneman Constr., Inc. v. Montana Dakota Utilities Co., 504 F.2d 1365 (8th Cir. 1974) 14

Lodge No. 12 of District 37, IAM v. FMC Corp., 551 F. Supp. 83 (S.D. Tex. 1982) 9n

Management Systems Assocs., Inc. v. McDonnell Douglas Corp., 762 F.2d 1161 (4th Cir. 1985) 14

PAGE

Marine Transport Lines, Inc. v. International Organization of Masters, Mates & Pilots, 636 F. Supp. 384 (S.D.N.Y. 1986) 6n

Monroe Sander Corp. v. Livingston, 377 F.2d 6 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) 11

Old Colony Trust Co. v. City of Omaha, 230 U.S. 100 (1913) 14

Paragon Resources v. National Fuel Gas Distrib. Corp., 695 F.2d 991 (5th Cir. 1983) 14

Sanchez v. Maher, 560 F.2d 1105 (2d Cir. 1977) 14

Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957) 8

Transportation-Communications Employees Union v. Union Pacific R.R. Co., 385 U.S. 157 (1966) 14n

Troy Mining Corp. v. Itmann Coal Co., 346 S.E.2d 749 (W. Va. 1986) 9

United Steel Workers of America v. North Bend Terminal Co., 752 F.2d 256 (6th Cir. 1985) 8, 16

Viacom Int'l, Inc. v. Lorimar Prods., Inc., 486 F. Supp. 95 (S.D.N.Y. 1980) 14

Zenith Radio Corp. v. NLRB, 81 LRRM 2396 (7th Cir. 1972) 8

Zink v. Pittsburgh & Midway Coal Mining Co., 374 S.W.2d 158 (Mo. Ct. App. 1964) 9

Statutes:

28 U.S.C. § 1254(1) 2

29 U.S.C. § 185(a) 6, 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. _____

MARINE TRANSPORT LINES, INC.,

Petitioner,

—vs.—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Second Circuit is reported at 878 F.2d 41 and is reprinted as Appendix A. The Opinion of the District Court for the Southern District of New York is reported at 696 F. Supp. 1, and is reprinted as Appendix B.

JURISDICTION

The Opinion of the Court of Appeals for the Second Circuit was dated and entered on June 13, 1989.[1] Petitioner then filed a

1 The judgment of the Court of Appeals was initially entered on June 13, 1989 and then corrected and re-entered on October 20, 1989. A copy of the corrected judgment is annexed hereto as Appendix C.

timely petition for rehearing and suggestion for rehearing in banc. On July 31, 1989, the Court of Appeals entered an order denying the petition for rehearing.[2]

This Court has jurisdiction to review the judgment below by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185, which states as follows:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

STATEMENT OF THE CASE

The decisions of the courts below lay down some startling propositions with respect to the interpretation of labor contracts which conflict, not only with important labor law policies underlying the Labor-Management Relations Act and well-established federal principles of labor contract interpretation, but also with decisions of the United States Supreme Court and other federal courts of appeals. In particular, the Second Circuit's decision would establish for the first time, as part of the federal common law governing the interpretation of collective bargaining agreements, that:

1. The duration of a written collective bargaining contract can be deemed extended by an oral agreement even though there is no express oral agreement to extend and no basis for

---

2 A copy of the order denying the petition for rehearing is annexed hereto as Appendix D.

arguing that such extension must be necessarily implied from what was orally agreed to;

2. Evidence of the parties' conduct, showing that they in fact understood that the duration of the collective bargaining contract had *not* been extended, must be disregarded as a matter of law; and

3. The burden of proof may be reversed so that an agreement to extend a party's obligations under a collective bargaining contract may be found based on the very absence of evidence that the subject of an extension was ever discussed.

Petitioner Marine Transport Lines, Inc. respectfully submits that, unless corrected, these holdings will significantly distort the federal common law with respect to the interpretation of labor contracts and will frustrate federal labor law policy by undermining the enforceability of collective bargaining agreements as written.

A. Statement of Facts

This case involves a dispute between an employer, Marine Transport Lines, Inc. ("MTL"), and a union, the International Organization of Masters, Mates and Pilots ("MM&P"), concerning the termination date of a written collective bargaining agreement between the parties known as the "Master Agreement." That agreement expressly provided that it had a termination date of June 15, 1984, but that it would be automatically extended for an additional year unless either party gave notice at least 60 days prior to that termination date of an intent to modify, amend or terminate. (JA-1495).[3]

---

3 References to "JA" in this petition are to the Joint Appendix filed by the parties in the Court of Appeals; references to "A" are to Appendix A, the Court of Appeals Opinion; references to "B" are to Appendix B, the District Court Opinion of Judge Conboy.

In late 1982, the parties orally agreed to modify certain wage and related terms of the Master Agreement.[4] The purpose of this oral agreement was to keep MTL's labor costs competitive so it could retain its contract with the U.S. Navy for the operation of nine "Sealift" vessels. Accordingly, the oral agreement applied only to the Sealift vessels; and the reductions in wages and other related benefits were to remain in effect until the expiration of MTL's contract with the Navy on May 7, 1985.

It is undisputed that the parties, in entering into the oral agreement, never discussed an extension of the Master Agreement's June 15, 1984 termination date or the continuation beyond that date of any contractual obligations, other than the understanding that the four items specifically referred to in the oral agreement would not be changed until May 7, 1985.[5]

It is also clear that an extension of the Master Agreement beyond June 15, 1984 cannot be implied as a *necessary* consequence of the fact that the oral agreement, which admittedly amended the Master Agreement in four specific respects, was to last until May 1985. For one thing, it is undisputed that MTL simultaneously entered into substantially identical agreements with its three other unions modifying their master agreements, yet both MTL and those other unions agreed that the June 15, 1984 termination dates in those master agreements remained unchanged even though the stated term of the amendments, like

---

4 Specifically, this oral understanding modified the Master Agreement by: (1) rolling back and freezing the wage, overtime and penalty rates paid to MM&P members at June 1981 levels; (2) eliminating certain bonuses for service on diesel and automated vessels; (3) reducing vacation time from 30 days for every 30 days worked to 13 days for every 30 days worked; and (4) reducing air transportation allowances from first to economy class. These provisions were reduced to writing in a draft agreement (JA-1595-96), which, while never executed, the parties agree accurately sets forth (with one immaterial exception) the terms of the oral agreement. (B-21-22 & n.11).

5 *See* B-32 (citing unrebutted testimony by MTL officials that "during the 1982 negotiations [MTL] did not discuss with [MM&P] any aspects of the Master Agreement except those they needed to modify to secure the extension of the Navy contract").

the oral agreement with MM&P, was to May 7, 1985.[6] It is also undisputed that, in 1974, MM&P itself entered into an agreement with MTL which modified the manning provisions of the then-existing Master Agreement (*i.e.*, it lowered the required number of officers from 5 to 4), and provided that the term of this modification was to last beyond the termination date of the Master Agreement (JA-645-47). Yet the parties clearly understood that the manning amendment did *not* have the effect of extending the term of the Master Agreement itself.[7]

The evidence also showed that in 1984, MM&P itself fully understood that the termination date of the Master Agreement had not been extended beyond June 15, 1984. Thus, on April 8, 1984, MM&P wrote a letter to "Marine Transport Line, USN" (MTL's Sealift tanker operation) declaring MM&P's intent to modify and amend the Master Agreement which, MM&P expressly acknowledged, "expires at midnight, June 15, 1984." (JA-1699). Subsequently, on June 13, 1984, seeking to disavow its own April 8 termination letter, MM&P sent a second letter to MTL claiming that the Master Agreement had been extended for another year because MTL had not given the required notice of an intent to terminate 60 days prior to June 15, 1984—which it thereby confirmed was in fact the Master Agreement's termination date.[8]

---

6 Each of the three other unions expressly acknowledged that its master agreement terminated on June 15, 1984, and they all entered into new collective bargaining agreements as of June 16, 1984. (JA-1783, 1803; *see also* JA-1831). The modifications applicable to the Sealift vessels previously agreed to with these other unions were then applied to modify the new collective bargaining agreement until May 7, 1985, after which time the new collective bargaining agreements would remain in effect without the modifications. (JA-1800, 1817, 1824).

7 Instead, the modification was interpreted as merely placing limits on what could be negotiated under new collective bargaining agreements, so that whatever else was or was not agreed to, the manning requirements could not be increased under subsequent collective bargaining agreements. (JA-647, 853, 2996).

8 In the first district court opinion issued in this action, the late Judge Weinfeld found that MM&P's own April 8, 1984 letter was sufficient

B. Prior Proceedings

MTL brought this action under section 301 of the Labor Management Relations Act (29 U.S.C. § 185) for a declaratory judgment that the Master Agreement had terminated on June 15, 1984. In response, MM&P counterclaimed, alleging that, as a result of its 1982 oral agreement with MTL, the term of the Master Agreement had been extended by implication until May 7, 1985.[9]

At trial, the main factual issue in dispute was whether the oral agreement was intended just to freeze wages or all of the Master Agreement's contractual terms.[10] The union argued that all the Agreement's terms had been frozen to May 1985, from which it could be inferred that the Agreement as a whole had been extended to that date.[11] District Judge Conboy resolved this key factual issue in favor of *MTL*. (B-37).[12] Nonetheless, and even though it was undisputed that the parties had never discussed the matter, Judge Conboy concluded that the parties intended to extend the duration of the Master Agreement to

---

to trigger termination under the Master Agreement and that the Master Agreement therefore was not automatically extended by virtue of MTL's failure to give its own notice of termination. *See Marine Transport Lines, Inc. v. International Organization of Masters, Mates & Pilots*, 636 F. Supp. 384, 387-89 (S.D.N.Y. 1986).

9 MM&P asserted three other counterclaims which were dismissed on summary judgment by Judge Weinfeld in his 1986 opinion (reported at 636 F. Supp. 384).

10 *See* JA-1065 (statement by MM&P's trial counsel that this was the "one and really only one significant dispute between the parties").

11 *See* JA-1400 (statement by MM&P's counsel that the Master Agreement should be deemed extended because "there [was]n't much left of the [M]aster [A]greement that [the parties hadn't] already agreed to extend").

12 The court of appeals noted that "Judge Conboy agreed with MTL that MM&P had agreed only to wage reductions." (A-9). However, the court of appeals then dismissed the significance of this key finding by inexplicably asserting that "MM&P's line of contention and proof [was] irrelevant to the outcome of the case." (A-10).

May 1985. (B-37). In reaching this conclusion, the district court disregarded as legally irrelevant MM&P's 1984 letters evidencing its understanding that the Master Agreement had expired on June 15, 1984. (See discussion *infra* at 12-14). In addition, the district court placed the burden of proof on *MTL* and, on that basis, proceeded to use the fact that the parties had never discussed whether or not MTL's obligations under the Master Agreement would be extended beyond June 15, 1984 as a basis for finding that such an extension had in fact been agreed to. (See discussion *infra* at 15-16).

The court of appeals, with only two judges participating,[13] affirmed the district court, concluding that the parties did intend to extend the Master Agreement. (A-8). The court of appeals also affirmed without discussion the district court's holdings that pre-litigation evidence of a party's understanding could be disregarded as legally irrelevant and that the burden of proof could be shifted, merely stating that it would "eschew an extensive analysis of the legal issues, for we agree with most of what Judge Conboy wrote" (A-4); and that "[w]e agree with most of Judge Conboy's discussion of [MTL's] points and will not add our own." (A-9).

REASONS FOR GRANTING THE WRIT

I. THE HOLDING BELOW, THAT THE DURATION OF A WRITTEN COLLECTIVE BARGAINING AGREEMENT MAY BE FOUND TO HAVE BEEN EXTENDED ORALLY WITHOUT ANY EXPRESS AGREEMENT TO THAT EFFECT, DEPARTS FROM BASIC PRINCIPLES OF LABOR LAW AND CONTRACTUAL INTERPRETATION AND CONFLICTS DIRECTLY WITH PRIOR DECISIONS OF THIS COURT AND OTHER FEDERAL COURTS OF APPEALS

It is well-established that the interpretation of collective bargaining agreements under section 301 of the Labor-

13 Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, sitting by designation, participated in oral argument but subsequently disqualified himself. (A-1).

Management Relations Act, 29 U.S.C. § 185, is governed by federal common law (*Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 456-57 (1957)); and that, in determining the substance of that federal law, traditional rules of contractual interpretation apply to the extent they are not inconsistent with federal labor policies. *H.C. Lawton, Jr., Inc. v. Truck Drivers, Chauffeurs & Helpers Local Union No. 384*, 755 F.2d 324, 328 n.3 (3d Cir. 1985). *See also United Steel Workers of America v. North Bend Terminal Co.*, 752 F.2d 256, 259 (6th Cir. 1985).

One basic principle, recognized by several federal courts of appeals prior to the Second Circuit's decision in this case, is that, in light of the strong federal policy in favor of written collective bargaining agreements, the terms of such agreements must be strictly construed. *See Irwin v. Carpenters Health and Welfare Trust Fund for California*, 745 F.2d 553, 557 (9th Cir. 1984) (holding that written collective bargaining agreements, including, in particular, termination clauses, should be strictly construed, since "[j]udicial rewriting of labor contract terms that are clear in both the language used and situations addressed would undermine this private bargaining process which federal labor policy promotes"); *Zenith Radio Corp. v. NLRB*, 81 LRRM 2396 (7th Cir. 1972) (federal labor policy does not warrant presumption that a vague agreement to extend most, but not all of the provisions of a written collective bargaining agreement must be construed to also impliedly extend the no-strike provision of the written agreement); *Genesco, Inc. v. Joint Council 13, United Shoeworkers of America*, 341 F.2d 482, 486 (2d Cir. 1965) (stressing "the importance attached to signed contracts in the field of collective bargaining" in declining to enforce alleged oral agreement).[14]

---

14 As one district court has noted:

"Tolerating modifications [of written collective bargaining agreements] through informal agreement or unspoken acquiesence . . . creates the danger of substituting for collective bargaining a system of subtle suggestions, coercion or intimidation. This is not what Congress has mandated, and this Court may not formulate and apply a rule which would so interpret the National Labor Relations Act."

(footnote continued on following page)

It is a well-settled rule of contract interpretation, fully in accord with the labor law policies referred to above, that in order to change orally the express terms of a written contract, the oral agreement to amend "must be of such specificity and directness as to leave no doubt of the intention of the parties to change what they previously solemnized by a formal document." *E.g.*, *Troy Mining Corp. v. Itmann Coal Co.*, 346 S.E.2d 749, 755 (W. Va. 1986); *Gloeckner v. School Dist. of Baldwin*, 405 Pa. 197, 200, 175 A.2d 73, 75 (1961). *Accord Greater Kansas City Labor Pension Fund v. B.E.A.M., Inc.*, 754 F.2d 297, 298 (8th Cir. 1985) (oral agreement to cancel prior written contract must be "much more definite" than general statements giving negotiator the impression such an agreement was reached); *Zink v. Pittsburgh & Midway Coal Mining Co.*, 374 S.W.2d 158, 163-64 (Mo. Ct. App. 1964) ("the undertaking of obligations . . . said to have been created [by an oral modification to a written agreement] must be positive, clear, specific, definite and so unequivocal as to leave no doubt as to the intention of the parties to change what had previously been in writing").

Here, the decision of the court of appeals *recognized* that "there was no explicit, fully articulated agreement to extend the [duration of] the Master Agreement." (A-8). In fact, it is undisputed that the subject of extending the Master Agreement was never even discussed by the parties. (JA-549-51, 1172). Nonetheless, the court concluded that the parties intended to extend the Master Agreement, relying on the principle that "[a]n agreement to [orally] modify a [written] contract may be proven circumstantially by the conduct of the parties." (A-8). Yet the only circumstances noted by the court had nothing to do with

---

Lerwill v. Inflight Services, Inc., 379 F. Supp. 690, 692 (N.D. Cal. 1974), *aff'd*, 582 F.2d 507, 513 (9th Cir. 1978). *See also Lodge No. 12 of District 37, IAM v. FMC Corp.*, 551 F. Supp. 83, 91-92 (S.D. Tex. 1982) (parol evidence rule applied to collective bargaining agreements because "[v]ariation of written contracts by evidence of prior oral agreements would serve only to undermine the integrity of the agreements by interjecting an unnecessary element of uncertainty into the collective bargaining process").

the parties' actual conduct, but rather consisted solely of the court's own observations—not based on any findings by the district court and without any citation to the record—that "it suited MTL's purposes" for the 1982 oral agreement to extend the duration of the Master Agreement. (A-8).

Should this remain the law, federal courts in the Second Circuit, and possibly elsewhere, will have unfettered discretion to circumvent the express terms of written collective bargaining agreements and to modify those express terms based on nothing more than the courts' after-the-fact conception of what may have "suited [the] purposes" of either party. That is contrary to essential labor law policies, the decisions of other circuits cited above and long-established principles of contract law.[15]

The decisions below also distort the federal common law governing the interpretation of labor contracts in that they evidently assume that whenever an agreement modifying certain aspects of a labor contract extends beyond the termination date of the contract being modified, this *necessarily* means that the

---

15 The court of appeals in the opinion below failed to come to grips with the conflict between its decision and established contract law because it misconstrued the existing law. Thus, the court below characterized *Gloeckner v. School District of Baldwin*, 405 Pa. 197, 175 A.2d 73 (1961), as requiring "*evidence* 'of such specificity and directness as to leave no doubt' " (A-7-8; emphasis added). However, the law as established in *Gloeckner* and like cases is that, in order to establish an oral amendment of a written contract, the oral agreement *itself* "must be of such specificity and directness as to leave no doubt of the intention of the parties." *Gloeckner*, 405 Pa. 197, 200, 175 A.2d 73, 75. In other words, the parties must at least orally state, specifically and directly, that they are modifying their written contract in a particular way. A proper understanding of this unambiguous rule of law would have required the court below either to decide the case in MTL's favor or at least to reject the controlling legal principle in some reasoned manner, since the court of appeals *conceded* that "there was no explicit, fully articulated agreement [between MTL and MM&P] to extend the Master Agreement." (A-8).

parties intended to extend the term of the labor contract itself.[16] This assumption is contrary to the law of other federal courts of appeals and, indeed, to prior decisions of the Second Circuit. In fact, agreements fixing specific future employment terms for a period which lasts beyond the term of a particular collective bargaining agreement have *not* been deemed to extend the term of the collective bargaining agreement itself. *See Heheman v. E.W. Scripps Co.*, 661 F.2d 1115, 1121 (6th Cir. 1981), *cert. denied*, 456 U.S. 991 (1982) (promise of lifetime employment); *Boldt v. International Union, UAW*, 482 F.2d 985 (Temp. Emer. Ct. App. 1973) (cost of living adjustment catch-up clause); *Monroe Sander Corp. v. Livingston*, 377 F.2d 6, 11 (2d Cir.), *cert. denied*, 389 U.S. 831 (1967) (agreement not to move shop or operation "at any time").

The decision below thus radically changes the legal ground rules governing collective bargaining in this country. From now on, every agreement which fixes a particular term of employment beyond the term of a collective bargaining agreement may (at least in the Second Circuit) be taken as an unspoken agreement to extend the collective bargaining agreement itself—particularly when (as will generally be the case) a court can find that such an extension would have "suited" one of the parties' "purposes." This change in the legal assumptions applicable to collective bargaining—casually made by the court of appeals without any discussion as to its impact—will introduce uncertainty and constraints on negotiations which will inevitably impede the collective bargaining process.

---

16 This non sequitur appears as follows in the district court's opinion: "There is no dispute that the [oral] Sealift Agreement expired simultaneously with the Navy Contract's third extension [*i.e.*, on May 7, 1985]. This has been proven by clear and convincing evidence. [citation omitted]. *Thus*, the duration of the Master Agreement was extended in relation to the Sealift vessels, while the terms of the Master Agreement not modified were made applicable to those ships until the new termination date of May 7, 1985." (B-30; emphasis added).

II. THE HOLDING BELOW, THAT EVIDENCE OF THE PARTIES' PRE-LITIGATION INTERPRETATION OF THEIR COLLECTIVE BARGAINING AGREEMENT IS IRRELEVANT AS A MATTER OF LAW, CONFLICTS WITH SUPREME COURT PRECEDENT AND THE LAW OF OTHER CIRCUITS

The district court—in a crucial ruling endorsed *sub silentio* by the court of appeals—disregarded as legally "irrelevant" two letters sent by MM&P to MTL in April and June 1984 which evidenced MM&P's understanding that the Master Agreement's June 15, 1984 termination date had not been changed.

The first letter, dated April 8, 1984, was sent by MM&P to "Marine Transport Line, USN" (MTL's Sealift tanker operation), declaring MM&P's intent to modify and amend the Master Agreement which, MM&P expressly acknowledged, "expires at midnight, June 15, 1984." (JA-1699).[17]

In the second letter, sent to Marine Transport Lines, USN on June 13, 1984, MM&P advised MTL that, "by virtue of the provisions of [the Master Agreement] and your failure to serve notice of termination pursuant thereto, such Collective Bargaining Agreement has been renewed through June 15, 1985." (JA-1705). This letter shows that, as of June 13, 1984, MM&P assumed that MTL's deadline for serving notice of termination 60 days prior to the termination date had *already passed*—an assumption that would only have made sense if MM&P shared MTL's understanding that the termination date of the Master Agreement was still June 15, 1984. Had the Master Agreement actually been extended to May 1985—which Judge Conboy concluded was the parties' understanding—then MTL's deadline for providing notice of termination would not have occurred until *March 1985*, and MM&P's June 13, 1984 letter would have made no sense.

---

17 *See also* A-3 (statement in the Second Circuit opinion that "[o]n April 8, MM&P informed MTL that the union intended to modify and amend the Master Agreement *when it expired in June, 1984*") (emphasis added).

Notwithstanding such clear evidence of MM&P's actual understanding of the Master Agreement, Judge Conboy ruled that the letters were "irrelevant" because, even though they were written prior to the litigation, they post-dated the parties' 1982 oral agreement. (B-33). Specifically, in discussing the letters, Judge Conboy ruled that, "even if [MM&P President] Lowen possessed this subjective view of the Sealift Agreement [*i.e.*, that it did not impliedly extend the duration of the Master Agreement], he failed to express it *in 1982*, at the time the parties agreed to the modification. Because any such intent was not expressed, it is irrelevant." (B-33; emphasis added).[18] Subsequently, the court of appeals, without discussion, placed its imprimatur upon this holding by the district court by stating broadly that it "agree[d] with most of what Judge Conboy wrote." (A-4).

This portion of the decisions below conflicts directly with the settled principle recognized by this Court, the other circuits and indeed other federal courts in the Second Circuit itself that

---

18 Judge Conboy also found the June 13, 1984 letter legally irrelevant based on his *a priori* assumption that the Master Agreement had been extended to May 1985 and the resulting determination that any evidence to the contrary was a "legal nullity." (B-34). As he put it:

> "This [June 13] letter is a dubious predicate for [MTL's] claim [that the letter showed MM&P's understanding that the Master Agreement expired on June 15, 1984], since it was a legal nullity. Because section I(1) of the Master Agreement was incorporated fully into the Sealift Agreement, MTL had until sixty days prior to May 7, 1985 to serve a notice of intent to renegotiate, amend or terminate the Sealift Agreement. When the June 13, 1984 letter was written, MTL's time to indicate such intent had not in fact expired." (B-34-35).

It would, to say the least, have a disruptive effect on the interpretation of collective bargaining agreements if this notion—that judicial assumptions should outweigh highly probative evidence—were to remain an integral part of the federal common law with respect to labor contracts.

As for the April 8, 1984 letter, the district court found it had been sent to MTL "mistakenly" (B-32), based solely on the testimony of a witness who admitted he had *no* knowledge, direct or indirect, as to how the letter came to be sent to MTL. (JA-652-61).

> "The practical interpretation of a contract by the parties, manifested by their conduct for any considerable length of time before it becomes a subject of controversy, is entitled to great, if not controlling weight in the construction of the contract."

Viacom Int'l, Inc. v. Lorimar Prods., Inc., 486 F. Supp. 95, 98 n.5 (S.D.N.Y. 1980) (Weinfeld, J.). *Accord Old Colony Trust Co. v. City of Omaha*, 230 U.S. 100, 118 (1913); *Management Systems Assocs., Inc. v. McDonnell Douglas Corp.*, 762 F.2d 1161, 1171 (4th Cir. 1985); *Paragon Resources v. National Fuel Gas Distrib. Corp.*, 695 F.2d 991, 997 (5th Cir. 1983); *Cordingly v. Allied Van Lines, Inc.*, 563 F.2d 960, 964 n.9 (9th Cir. 1977); *Sanchez v. Maher*, 560 F.2d 1105, 1108 (2d Cir. 1977); *Linneman Constr., Inc. v. Montana Dakota Utilities Co.*, 504 F.2d 1365, 1368 (8th Cir. 1974).

If left standing, the decisions below will inject into the federal common law governing the interpretation of collective bargaining agreements the odd notion that proof of pre-litigation conduct demonstrating the understanding and intent of the parties is legally irrelevant, even though this Court and other federal courts of appeals have uniformly recognized that such evidence is of the highest probative value. The inevitable effect of this ruling will be to insulate the interpretation of collective bargaining agreements from the most reliable evidence as to the actual intent of the parties, thereby undermining the efficacy and fairness of labor contracts generally.[19]

---

19 The district court's decision, endorsed by the Second Circuit, is also at odds with the directive of this Court that "in order to interpret" the meaning of a collective bargaining agreement, "it is necessary to consider the scope of other related collective bargaining agreements, as well as the practice, usage and custom pertaining to all such agreements." *Transportation-Communications Employers Union v. Union Pacific R.R. Co.*, 385 U.S. 157, 161 (1966).

Had the district court followed *Transportation-Communications*, *supra*, it could not sensibly have reached the conclusion that the extension of the Master Agreement between MTL and MM&P was necessarily implied by the parties' 1982 oral agreement, since: (1) there was undisputed evidence that MTL's other unions fully recognized that their 1982 modifications of their Master Agreements (each of which extended to May 1985) did *not* extend the June 15, 1984 termination

III. THE HOLDING BELOW, REVERSING THE BURDEN OF PROOF, IS INCONSISTENT WITH FUNDAMENTAL PRECEPTS OF OUR LEGAL SYSTEM AND WITH THE LAW OF OTHER FEDERAL COURTS OF APPEALS

Judge Conboy, in finding that MTL's obligations under the Master Agreement had been extended beyond June 15, 1984, reasoned as follows:

> "[R]egardless of how the [oral] Sealift Agreement is viewed, the burden to show intent to supercede the provisions of the Master Agreement not addressed specifically in the Sealift Agreement rests with the party arguing for that result, MTL. . . . MTL has failed to show by even a preponderance of the evidence an intent in the fall of 1982, when the Sealift Agreement was agreed to, to reject the provisions of the Master Agreement that were not modified. Both Rand and Murphy, the only MTL officials who dealt with [MM&P President] Lowen, testified that during the 1982 negotiations they did not discuss with Lowen any aspects of the Master Agreement except those they needed to modify to secure the extension of the Navy Contract. See Tr. 625-27 (Murphy); *id.* at 678 (same witness, discussing San Francisco meeting specifically); *id.* at 681 (same witness); *id.* at 976 (Rand, discussing early November meeting)."

(B-31-32). The testimony cited to in the above excerpt from Judge Conboy's opinion states that there was *no* discussion of extending the Master Agreement beyond its stated expiration date and *no* discussion regarding the Master Agreement's termination clause.

---

date of their corresponding Master Agreements (see discussion *supra* at 4-5); and (2) there was undisputed evidence that, in 1974, MM&P itself had entered into a "Manning Agreement" which modified the then-existing Master Agreement in certain respects and which was to remain in effect *beyond* the 1975 termination date of the Master Agreement, but which MM&P nevertheless conceded did *not* extend the term of the Master Agreement. (See discussion *supra* at 5).

In other words, the district court first assumed that the termination date of the Master Agreement had been extended by virtue of the parties' oral agreement to freeze four specific terms of employment through May 1985, and then placed on *MTL* the burden of proving that all of its other obligations under the Master Agreement had not been extended. By thus standing on its head the normal rule as to burden of proof, the court used the very failure of the parties to discuss any extension of the Master Agreement as the basis for concluding that the Master Agreement had in fact been extended. (B-32).

This startling reversal of the burden of proof—which was approved without comment by the court of appeals—is contrary to one of the most basic axioms of American jurisprudence, *viz.*, that a party asserting a claim for breach of contract has the burden of proof. *See, e.g., United Steelworkers of America v. North Bend Terminal Co.*, 752 F.2d 256, 261 (6th Cir. 1985) ("the whole burden of proof is on the party alleging breach of a collective bargaining agreement").

In reversing the burden of proof in this case, the courts below have created an extremely dangerous precedent in the federal common law of the interpretation of collective bargaining agreements that, if allowed to stand by this Court, will invite chaos and injustice in the future resolution of collective bargaining disputes.

CONCLUSION

For the foregoing reasons, we respectfully request that a writ of certiorari be granted.

Dated: October 30, 1989

Respectfully submitted,

/s/ MICHAEL D. BLECHMAN

Michael D. Blechman
425 Park Avenue
New York, New York 10022
(212) 836-8000

Counsel of Record and
Attorney for Petitioner
Marine Transport Lines, Inc.

Of Counsel:

KAYE, SCHOLER, FIERMAN,
HAYS & HANDLER
425 Park Avenue
New York, New York 10022

Eric A. Sisco
MORGAN, LEWIS & BOCKIUS
801 South Grand Avenue
Los Angeles, California 90017

D. Michael Underhill
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036

Peter N. Popov
Marine Transport Lines, Inc.
150 Meadowland Parkway
Secaucus, New Jersey 07094

APPENDIX A

Order And Opinion of the United States Court of Appeals for the Second Circuit (June 13, 1989)

APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1072—August Term, 1988

(Argued April 25, 1989 Decided June 13, 1989)

Docket No. 89-7040

MARINE TRANSPORT LINES, INC.,

Appellant,

—v.—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Appellee.

Before:

OAKES, *Chief Judge*, and
MESKILL, *Circuit Judge*.*

Appeal from a judgment of the United States District Court for the Southern District of New York, Kenneth Conboy, *Judge*, holding that the parties had modified certain terms of their collective bargaining agreement, including its expiration date, with respect to the "Sealift" tankers operated by Marine Transport Lines. 696 F. Supp. 1 (S.D.N.Y. 1988).

Judgment affirmed.

* Immediately after oral argument, Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, who was sitting by designation, disqualified himself.

MICHAEL D. BLECHMAN, Kaye, Scholer, Fierman, Hays & Handler, New York, NY (Eric A. Sisco, Morgan, Lewis & Bockius, Los Angeles, CA, D. Michael Underhill, Francis X. Coonelly, Morgan, Lewis & Bockius, Washington, DC, Peter N. Popov, General Counsel, Marine Transport Lines, Inc., Secaucus, NJ, of counsel), *for Appellant.*

MICHAEL H. GOTTESMAN, Bredhoff & Kaiser, Washington, DC (Robert M. Weinberg, Raymond C. Hurley, Bredhoff & Kaiser, Washington, DC, Seymour Waldman, Vladek, Waldman, Elias & Engelhard, P.C., New York, NY, Burton Epstein, International Organization of Masters, Mates & Pilots, Linthicum Heights, MD, of counsel), *for Appellee.*

OAKES, *Chief Judge*:

The parties in this contract dispute are Marine Transport Lines, Inc. (MTL), a shipowner, and the International Organization of Masters, Mates & Pilots (MM&P), which represents deck officers in the merchant marine. In 1981, MTL and MM&P signed a collective bargaining agreement covering the deck officers employed by MTL. The agreement, called the Master Agreement, ran for three years and was scheduled to expire on June 15, 1984. It would be renewed automatically from year to year unless either party gave notice at least sixty days before the expiration date of an intention to modify, amend, or terminate the agreement.

Halfway through the term of the Master Agreement, MTL sought concessions from MM&P in order to obtain the renewal of a contract under which MTL operated nine "Sealift" tankers for the United States Navy. In November 1982, MTL and MM&P agreed to modify certain terms of their Master Agreement as it applied to the Sealift tankers. In this so-called Sealift

Agreement, the union accepted reductions in wages and other benefits from January 1, 1983 through May 6, 1985, which covered the term of the new contract that MTL hoped to conclude with the Navy.

The controversy between these parties arose in 1984. On April 8, MM&P informed MTL that the union intended to modify and amend the Master Agreement when it expired in June, 1984. Then, on June 15, MTL announced that the Master Agreement had expired and that the company no longer recognized MM&P as the representative of its deck officers. The following day, MTL sued for a declaratory judgment that, because of MM&P's April 8th communication, the Master Agreement had terminated on June 15, 1984. MM&P asserted four counterclaims. The late Judge Edward Weinfeld granted summary judgment to MTL on three of those counterclaims, including MM&P's assertion that the Master Agreement had been automatically renewed. He found, however, that there was a factual dispute between the parties concerning the scope of the Sealift Agreement. Hence, MM&P's counterclaim alleging that the Sealift Agreement had extended the term of the Master Agreement with respect to the nine tankers could not be resolved by summary judgment. *Marine Transp. Lines, Inc. v. International Org. of Masters, Mates & Pilots*, 636 F. Supp. 384 (S.D.N.Y. 1986).

The case came to trial on MM&P's remaining counterclaim before Judge Kenneth Conboy, sitting without a jury. MTL's position was that the Sealift Agreement existed independently of the Master Agreement and did not change the expiration date of the Master Agreement. MM&P argued that, when the parties concluded the Sealift Agreement, they intended that it should extend the term of the Master Agreement with respect to the Sealift tankers. Judge Conboy ruled in favor of MM&P, *Marine Transp. Lines, Inc. v. International Org. of Masters, Mates & Pilots*, 696 F. Supp. 1 (S.D.N.Y. 1988), and MTL filed this appeal. We agree with the district court that the Sealift Agreement modified the terms of the Master Agreement and extended its term until May 7, 1985, with respect to the Sealift tankers. We therefore affirm Judge Conboy's decision.

BACKGROUND

Judge Conboy presented a detailed narrative of the facts in this case. *See Marine Transp. Lines*, 696 F. Supp. at 1-14. We will summarize the events here and refer the curious reader to the district court opinion for additional details. We will also eschew an extensive analysis of the legal issues, for we agree with most of what Judge Conboy wrote. *See id.* at 14-28. In our discussion below, we will focus instead upon the issues that, in our opinion, merit further discussion.

The deck officers represented by MM&P are supervisory personnel under Section 2(11) of the National Labor Relations Act, 29 U.S.C. § 152(11) (1982). MTL is therefore not obliged to recognize or bargain with a representative of its captains and mates. *See* 29 U.S.C. § 164(a); *Marine Transp. Lines*, 636 F. Supp. at 386 & n.2, 388. Nevertheless, MTL and MM&P have, since at least the 1960s, concluded a series of collective bargaining agreements. The 1981 Master Agreement was the last in this series.

Meanwhile, in 1974, MTL had concluded a five-year contract with the Navy to operate its nine Sealift tankers. The Navy reimbursed MTL for its labor costs, which MTL documented by submitting a "Schedule A." Schedule A enumerated "total wages," defined by the contract to include wages, pension and welfare payments, vacation benefits, etc. The contract included an escalation clause which committed the Navy to reimburse MTL for increased labor costs. Whenever MTL's labor costs changed, the company sent the Navy a revised Schedule A.

MTL secured two-year renewals of its Navy contract in 1979 and 1981. In the early 1980s, however, the American merchant marine was continuing to suffer hard times. Competition intensified. In 1982, MTL faced a crisis: It had failed in three recent attempts to win new contracts with the Navy. As the time for renewing the Sealift tanker contract approached, MTL feared that the Navy would open that contract to competitive bidding. The company calculated that it could not bid successfully for the contract (or persuade the Navy to renew the contract without soliciting additional bids) unless it drastically reduced its labor costs. Moreover, MTL's corporate survival depended

upon continuing to operate the Sealift tankers. If MTL lost the Navy contract, it would probably fail to obtain loans that it needed to purchase a new ship, and it risked being liquidated by its parent company, GATX Corp.[1]

Hoping to reduce its labor costs, MTL turned to its unions and sought modifications in its collective bargaining agreements. MTL asked MM&P for four concessions that would apply only to deck officers working on the Sealift tankers: (1) the reduction of wages to their level of June 16, 1981, with wages frozen at that level for the duration of the upcoming extension of MTL's contract with the Navy (*i.e.*, until May 7, 1985); (2) elimination of the "diesel and automation allowance"; (3) reductions in vacation entitlements; (4) job-related travel in economy class, rather than first class. There were discussions between Thomas Murphy, MTL's personnel manager, and Robert Lowen, MM&P's international president, in which Murphy asserted that the deck officers' jobs depended upon agreeing to the concessions. Finally, on November 15, 1982, officials of MTL and MM&P met and agreed orally upon the changes proposed by MTL. This was the parties' Sealift Agreement. It included one concession to MM&P: The union would have the right to shift costs, so long as the total, reduced compensation remained unchanged.[2]

MTL negotiated with the Navy during this period and described the concessions that it sought from its unions. It sub-

---

1 For this appeal, MTL filed a statement disclosing interested parties pursuant to Rule § 0.15 of the Court of Appeals for the Second Circuit. According to the statement, MTL is now a publicly traded corporation with no corporate parent.

2 The parties never executed a writing to reflect their agreement. In June 1983, Murphy sent a draft "Memorandum of Agreement" to Lowen, explaining that the Navy required a formal agreement "respecting the contract changes pertaining to the Sealift Tankers." *Marine Transp. Lines*, 696 F. Supp. at 12 & n.11. MTL and MM&P agree that the memorandum accurately embodied the Sealift Agreement. However, Lowen did not sign the memorandum because it included an additional, objectionable paragraph that is irrelevant to the issues in this case. The memorandum also did not include the concession to MM&P giving it the right to shift costs. The parties agree that MM&P gained that right, but they disagree over its scope. *See id.* at 15-16.

mitted a revised Schedule A showing projected reductions in "total costs," and it estimated that the concessions would reduce annual operating costs by almost one million dollars per vessel. On November 12, 1982, MTL stated that it already had its unions' agreement to the lower wages; it submitted additional revised Schedule A's and assured the Navy that the figures would remain firm during the 1983-85 option period. Immediately after the November 15th meeting with the MM&P officials, MTL informed the Navy that the unions had agreed to implement the changes on January 1, 1983, rather than on May 7, 1983, when the next extension would begin. MTL reiterated that the new Schedule A would be "firm through May 1985."

MTL also weathered a storm with MM&P. It appeared that Lowen had not complied with his union's procedures for agreeing to modifications in contract terms under its "hardship rule." He intimated that MM&P might not be able to go through with the deal. This led to an animated meeting of MTL and MM&P officials during the Thanksgiving 1982 weekend. MTL's president, James Rand, agreed to provide the documentary support needed by Lowen to justify the concessions, and Lowen signed a letter for the Navy confirming the concessions that his union had made.

The unions' concessions satisfied the Navy. An internal government memorandum noted approvingly that, "under the revision of MTL's Schedule [*sic*] A which is to become effective on 1 January 1983, total wages (including fringe benefits) will actually decrease by approximately 30 percent in comparison with the currently effective Schedule A." On December 1, 1982, the Navy exercised its option to renew its Sealift contract with MTL for the period May 7, 1983 through May 6, 1985.

DISCUSSION

Judge Weinfeld identified the disputed issue on which summary judgment could not be granted as being "[w]hether or not the oral Sealift Agreement was intended to extend the duration of the Master Agreement as applied to the nine Sealift vessels." *Marine Transp. Lines*, 636 F. Supp. at 389. After an eight-day

bench trial, Judge Conboy found that the Sealift Agreement was "indisputably a modification" of the Master Agreement. *Marine Transp. Lines*, 696 F. Supp. at 15. He held that the existence of six modifying terms in the Sealift Agreement had been proven by clear and convincing evidence. These six modifications were: the four wage and benefit concessions sought by MTL, the duration of the Sealift Agreement until May 7, 1985, and the right of MM&P to make changes in the allocation of the benefits. *Id.* Judge Conboy concluded that "the parties intended that the Sealift Agreement extend the entire Master Agreement (as modified by the Sealift Agreement) with respect to the Sealift vessels until May 7, 1985." *Id.* at 21. He therefore dismissed MTL's complaint for declaratory judgment as it related to MM&P's surviving counterclaim and entered judgment in favor of MM&P. Other disputes between the parties were, pursuant to a stipulation, referred to arbitration.

The intent of the parties to a contract is, there is little doubt, a question of fact. *See Lowell v. Twin Disc, Inc.*, 527 F.2d 767, 769-70 (2d Cir. 1975). In a bench trial, the court's findings concerning the intent of the contracting parties will accordingly not be disturbed unless they are clearly erroneous. *May v. Nevada Irrigation Dist.*, 600 F.2d 1280, 1282 (9th Cir. 1979); Fed. R. Civ. Pa. 52(a). This applies to all fact-finding; under Rule 52(a), there is no distinction between "subsidiary" and "ultimate" facts. *Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982). These fundamental rules frame the issue for us in this appeal: Judge Conboy's conclusion that MM&P and MTL intended to extend the duration of the Master Agreement, as well as his findings concerning particular modifications of the Master Agreement, were findings of fact, and we must therefore affirm these findings unless they are clearly erroneous. *See Amerdyne Indus. v. Pom, Inc.*, 760 F.2d 875, 877 (8th Cir. 1985).

MTL argues that an oral agreement to modify a contract must be proven with evidence that is "so definite and unequivocal as to leave no doubt as to the parties' intent." It cites, for example, *Amerdyne Industries*, 760 F.2d at 877, in which the Court of Appeals for the Eighth Circuit required "clear, unequivocal, and decisive evidence," and *Gloeckner v. School Dis-*

trict of Baldwin, 405 Pa. 197, 200, 175 A.2d 73, 75 (1961), in which the Supreme Court of Pennsylvania required evidence "of such specificity and directness as to leave no doubt." MTL argues further, of course, that MM&P's proof in this case fell short of this rigorous standard. The district court found, however, that MM&P had proven the modification of the Master Agreement by clear and convincing evidence; accordingly, it was unnecessary for the court to decide whether that high standard of proof was required. *Marine Transp. Lines*, 696 F. Supp. at 15.

We agree with Judge Conboy that the Sealift Agreement must be deemed a modification of the Master Agreement. The evidence shows without any doubt that the parties intended to "amend"—*i.e.*, to modify—the Master Agreement when they negotiated and concluded the Sealift Agreement. *See id.* at 15 & n.12 (reviewing evidence and noting that the parties used the term "amend" in lieu of "modify"). The Sealift Agreement thus was not a "side agreement" that existed independently of the Master Agreement or that superseded it.

The evidence also shows that this modification of the Master Agreement was not limited to the four wage and benefit concessions sought by MTL; it was the intent of the parties to extend the term of the entire Master Agreement as it applied to the nine tankers. The fact that there was no explicit, fully articulated agreement to extend the Master Agreement in this way is no obstacle to this conclusion. An agreement to modify a contract may be proven circumstantially by the conduct of the parties. *E.g.*, *Byers Transp. Co. v. Fourth Nat'l Bank & Trust Co.*, 333 F.2d 822, 825 (10th Cir. 1964); *Recon Car Corp. v. Chrysler Corp.*, 130 A.D.2d 725, 729, 515 N.Y.S.2d 829, 833 (2d Dep't), *appeal denied*, 70 N.Y.2d 612, 518 N.E.2d 7, 523 N.Y.S.2d 496 (1987). MM&P points out that it suited MTL's purposes in 1982 for the Sealift Agreement to extend the term of the Master Agreement. MTL expected that MM&P would perform its side of the bargain through the entire term of the Sealift Agreement; indeed, MTL *needed* MM&P's cooperation after June 15, 1984, in order to hold labor costs firm for the Navy. Evidently, by June 1984, MTL had decided that it could manage without the union, but there is no credible evidence that MTL contemplated

this step or communicated it to MM&P in the autumn of 1982. Recognizing the district court's opportunity to assess the witnesses' credibility, *see Marine Transp. Lines*, 696 F. Supp. at 19, we are convinced that Judge Conboy's decision concerning the scope of the Sealift Agreement was not clearly erroneous. *See* Fed. R. Civ. P. 52(a); *Unitec Corp. v. Beatty Safway Scaffold Co.*, 358 F.2d 470, 474 (9th Cir. 1966).

MTL has repeated on appeal the arguments that it presented to the district court. We agree with most of Judge Conboy's discussion of these points and will not add our own. However, one apparent "anomaly" received particular attention in oral argument before us and deserves more discussion here. This concerns the significance of the fact that, on January 1, 1983, and again on January 1, 1984, pursuant to the Master Agreement, MTL increased the rate at which it contributed to the MM&P's Health and Benefit Plan.

MM&P claimed at trial that MTL and MM&P had agreed during the 1982 negotiations to "lock in" *all* of Schedule A's labor costs; this claim supposedly supported the union's argument that the Sealift Agreement incorporated the entire Master Agreement. MTL's theory of the case was that the Sealift Agreement had not incorporated the entire Master Agreement. Therefore, in response to the union's claim, MTL argued that only the four, specified items had been locked in; it pointed to its increased contributions to the Health and Benefit Plan as evidence to support this argument. *Marine Transp. Lines*, 696 F. Supp. at 20. Judge Conboy agreed with MTL that MM&P had agreed only to wage reductions, but he went on to say: "Accordingly, this line of contention and proof is irrelevant to the outcome of the action." *Id.* MTL complains that this legal conclusion conflicts with the court's own factual finding. It follows, continues MTL, that Judge Conboy's factual finding conflicts as well with his ultimate conclusion that the Master Agreement was extended.

Judge Conboy's use of the word "accordingly" telescoped and somewhat obscured his reasoning; further explanation will, we hope, clarify the point. The Sealift Agreement modified the Master Agreement, as it applied to the Sealift tankers, in six distinct ways—the four wage and benefit reductions, the extension

until May 7, 1985, and MM&P's right to shift costs—and left the rest of it unmodified. As the district court pointed out in another context, " '[m]odifications do not necessarily abrogate the original contract entirely; indeed, the terms of the old contract are still to be followed so far as not changed or as inconsistent with the new terms.' " *Id.* at 16 (quoting *Robinson v. Crosson*, 149 Colo. 235, 238, 368 P.2d 791, 792-93 (1962)); *see also Chicago College of Osteopathic Medicine v. George A. Fuller Co.*, 776 F.2d 198, 208 (7th Cir. 1985) ("A modification of a contract is a change in one or more respects which introduces new elements into the details of the contract, cancels some of them, but leaves the general purpose and effect undisturbed."); *Beacon Terminal Corp. v. Chemprene, Inc.*, 75 A.D.2d 350, 354, 429 N.Y.S.2d 715, 717-18 (2d Dep't) ("The modification of a contract results in the establishment of a new agreement between the parties which *pro tanto* supplants the affected provisions of the original agreement while leaving the balance of it intact."), *appeal denied*, 51 N.Y.2d 706, 413 N.E.2d 369, 433 N.Y.S.2d 1026 (1980). Among the provisions of the Master Agreement that the Sealift Agreement did *not* modify were the scheduled increases in MTL's contributions to the Health and Benefit Plan. MTL did no more than fulfill an existing obligation when it increased its contributions to the Plan—an obligation that was carried over, unchanged, from the original Master Agreement.

Thus, it was *MM&P*'s line of contention and proof that appeared irrelevant to the outcome of the case—or, if relevant, then of very little probative value. The ultimate issue was whether MTL and MM&P intended to extend the duration of the Master Agreement with respect to the Sealift tankers when they concluded the Sealift Agreement. The union would have gained little from proving that they agreed to lock in all of the items on Schedule A, rather than just the four items specified by MTL. Consequently, MTL gained little from refuting MM&P's argument; in that sense, MTL's proof was irrelevant.

Judgment affirmed.

APPENDIX B

Opinion and Order of the United States District Court for the Southern District of New York (Conboy, J.) (September 29, 1988)

APPENDIX B

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

85 Civ. 1360 (KC)

MARINE TRANSPORT LINES, INC.,

Plaintiff,

—v.—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES, & PILOTS,

Defendant.

OPINION

Kenneth Conboy, *District Judge*:

In the early 1980s hard times fell upon the American maritime shipping industry. The international market for such services was being increasingly dominated by foreign carriers, principally, it was thought, because labor costs on American vessels made them non-competitive. In such circumstances, the shipping companies and unions sometimes found themselves in common distress at the prospective loss of contracts and jobs. In extreme circumstances, imminent bankruptcy of the company spurred the union to agree to drastic reductions in the wages and benefits of its members in order to avert the dual disaster of company collapse and discharge of ships' crews. The matter before the court is such a case.

The plaintiff shipper told its unions, including the defendant, that a contract it had with the Navy to manage nine Sealift vessels would not be renewed routinely by the Navy. To secure the renewal, the plaintiff determined that it must offer to the Navy a substantial reduction in labor costs. The defendant union orally agreed to the reductions for a two year period, thereby

protecting the jobs of the deck offices on those nine ships, and the shipper consequently managed to secure its contract with the Navy for another two years. At a subsequent date during this two year term, the Master Collective Bargaining Agreement between the shipper and the union, covering all of the shipper's vessels, including the nine Sealift vessels, was by its terms scheduled to expire unless renewed. The shipper declined to negotiate a renewal, and later signed a new collective bargaining agreement with a rival union. On the final day of the Master Collective Bargaining Agreement, the shipper sent a letter to all deck offers on its vessels, including the nine Sealift ships, and advised them that the defendant union was no longer their bargaining agent, and set forth unilateral terms and conditions for continued employment.

The central issue remaining in the trial of this case is whether the oral "Sealift Agreement" modified and extended the "Master Agreement," with respect to the Sealift vessels, as the defendant union contends, or whether the Sealift Agreement merely incorporated necessary terms of the Master Agreement and existed independent of it, as the shipper contends. On this critical question, it should be noted at the outset that a written draft of the oral Sealift Agreement does not explicitly incorporate the Master Agreement, but does explicitly refer to certain of its clauses.

The plaintiff, Marine Transport Lines, Inc. ("MTL" or the "Employer") instituted this action for a declaratory judgment that its collective bargaining agreement with the defendant, International Organization of Masters, Mates, & Pilots, AFL-CIO ("MMP" or the "Union"), terminated at midnight June 15, 1984. In an Opinion filed June 6, 1986, the late Honorable Edward Weinfeld, U.S.D.J., granted MTL summary judgment declaring that the collective bargaining agreement between the parties (the "Master Agreement") expired according to its terms on June 15, 1984. *See Marine Transp. Lines v. International Org. of Masters, Mates, & Pilots*, 636 F. Supp. 384, 389 (S.D.N.Y. 1986). Judge Weinfeld also granted summary judgment to MTL dismissing the Union's first counterclaim, that the Master Agreement was extended for all purposes by its terms, *see id.*, summary judgment dismissing the Union's third

counterclaim, that the Union may recover for breach of the Master Agreement on a theory of promissory estoppel, *see id.* at 391, and judgment on the pleadings dismissing the Union's fourth counterclaim, based on a theory of tortious interference with contract. *See id.* at 392. Judge Weinfeld refused to grant summary judgment on the Union's second counterclaim. *See id.* at 390.

The second counterclaim involves the oral agreement entered into between the parties, called the "Sealift Agreement." *See id.* at 386.

> During the effective period of the Master Agreement, in the fall of 1982, MTL requested wage and benefit concessions by Union members working aboard nine vessels operated by MTL under contract with the United States Navy's Marine [sic] Sealift Command. MTL told the Union that the Navy would not renew its contract with MTL unless the Union agreed to the requested labor cost reductions.

Id.

This court conducted a bench trial of the Union's second counterclaim over eight trial days, from June 20, 1988 to July 1, 1988. This Opinion constitutes the court's findings of fact and conclusions of law, pursuant to Fed. R. Civ. P. 52.

Pursuant to an Order filed December 22, 1986, on the consent of the parties, the court must decide whether the Sealift Agreement extended the entire Master Agreement (as modified by the oral agreement) between June 16, 1984 and May 7, 1985 with respect to the Sealift vessels. If the court decides that question in the Union's favor, all remaining issues (breaches, defenses, remedies) will be submitted to arbitration. If the court decides the initial question in the Employer's favor, the court will decide what breaches of the Sealift Agreement, if any, MTL committed between June 16, 1984 and May 7, 1985. In this latter event, the court will decide also whether MTL has any defenses to any breaches found. The issue of remedies, if appropriate, will be submitted to arbitration. On this question, if reached, the court will determine merely the period between June 16, 1984 and May 7, 1985 for which remedies are appropriate.

BACKGROUND

A. The Original Navy Contract

"The Union . . . represents supervisory personnel, who are not covered by the National Labor Relations Act's guarantee of the right to collective bargaining." *Marine Transp. Lines*, 636 F. Supp. at 388 (citing, *inter alia*, 29 U.S.C. §§ 152(3), 152(11), & 164(a)). Nevertheless, the Union, which predates the National Labor Relations Act, has had collective bargaining agreements, the Master Agreements, with a substantial number of employers, including MTL, for many years. Although it is unclear when the parties first made a labor agreement, MTL and the Union had had a Master Agreement at least as far back as the middle of the 1960s. MTL and the Union entered into a Master Agreement to run from June 16, 1972 to midnight June 15, 1975. Thereafter, MTL and the Union renewed the Master Agreement in 1975, in 1978, and in 1981. Each renewal covered a three-year period.

During the course of the '72-'75 Master Agreement, MTL learned of the opportunity to bid on a contract to manage a group of nine vessels, the Sealift vessels,[1] for the United States Navy. However, a major impediment existed to MTL's ability to bid on the contract being offered by the Navy. Specifically, in 1965, the Union had struck, seeking employment for a fifth deck officer per ship. At the time, each ship was manned by four MMP members (as well as employees of other unions). The Union won this concession, and all MTL ships were carry-

---

1 The United States Navy has described these vessels in this way:

> The nine Sealift Class tankers are handy-sized . . . clean coated product carriers propelled by twin medium speed diesels. These ships were designed and constructed . . . specifically to meet long term Military Sealift Command (MSC) requirements for economical handy size tonnage and have been continuously employed in MSC clean product service on a worldwide basis since their delivery to the Government under demise (bareboat) charters in 1974-5.

Defendant's Exhibit 14 (Memorandum for file, dated Nov. 29, 1982, by Frances C. Gapp & Charles C. Metzger, Contract Specialists, U.S.N.) at para. 2.

ing five MMP members in 1974. To secure the contract for the Sealift vessels, MTL had to get MMP to agree to a cap of four Union members per ship.

MTL approached the Union. The Union recognized that accommodation was necessary, for it no longer enjoyed the virtual monopoly position that it had enjoyed for almost one hundred years. *See* Trial Transcript[2] at 177-78. The Union agreed to modify the Master Agreement, as it applied to the Sealift vessels, so that MTL could bid on the Sealift vessels, or tankers, in accordance with the Navy's terms.

MTL won the contract, and in 1974, entered into a five-year contract with the Navy (the "Navy Contract") to manage the Sealift tankers. MTL routinely submitted to the Navy a document referred to as "Schedule A," the principal device to identify and control labor costs on the vessels, for which the Navy would be billed. Schedule A enumerates the various items calculated to establish the bulk, if not all, of the Contractor's reimbursable labor costs, what the Navy refers to as "total wages," *see* Defendant Exhibit[3] 15 at Art. 31(b): Non-Watch Allowance, Basic Monthly Wage, Overtime, Pension & Welfare, Vacation, Training Program, Feinberg Award,[4] and Payroll Taxes. In other words, the usage of Schedule A by the parties to the Navy Contract established each of the enumerated labor cost items as components of the single contract construct, "total wages."

The manning concession made by the Union (four Union members instead of five) continued in force on board the Sealift tankers through the 1975-'78 and 1978-'81 Master Agreements. The court notes parenthetically that MTL secured an extension of the original Navy Contract for two years, from 1979 to 1981. Whenever the Master Agreement created different labor costs, whether wages or fringe benefits, MTL submitted a revised

---

2 The court will henceforth refer to the Trial Transcript as "Tr. _____."

3 The court will refer henceforth to Union exhibits as "Dx _____," and to MTL exhibits as "Px _____."

4 The "Feinberg Award" is a contribution MTL makes to the Union's pension and welfare funds based on a formula involving vacation days. It is a reduced percentage of contributions made for working days. *See, e.g.*, Dx 55 (Deposition of Thomas Murphy) at 223-25.

Schedule A to the Navy. *See, e.g.*, Dx 32 (Letter from J.P. Hale, MTL Contract Specialist to Commander, MSC (May 6, 1982)) & Dx 33 (Letter from F.T. Hayden, MSC Director, Chartering and Contract Operating Div. to MTL (undated)); Tr. 963-64 (testimony of James H. Rand, MTL President) ("It was MTL's practice, if not the—a requirement of the contract, to provide Military Sealift Command with a revised schedule or a new Schedule A-1 or A-2 each time there was a material change in our costs. And when I say material change, I'm thinking most keenly of a new contract with our labor unions. Those contracts required approval by the Navy."); Dx 15 at Art. 6(k) ("All renewals or modifications of labor agreements negotiated by the Contractor covering the operation of the tankers under this Contract shall be submitted for approval by the Government before the same shall be binding on the Government."). MTL was awarded, without competitive bidding, two two-year extensions of the Navy Contract, running from May 7, 1979 to midnight May 6, 1981, and from May 7, 1981 to midnight May 6, 1983.

B. The 1982 Initial Discussions With MMP

In the early years of the 1980s, as has been noted, the American maritime industry found itself sailing upon turbulent economic waters. By 1982, according to the United States Navy, the American flag maritime industry faced an "extreme recession." Dx 14 at para. 3(b); *see also* Dx 45 (telex from MTL to all MTL vessels (June 15, 1984)) at 1-2 ("[T]he U.S. flag shipping industry has experienced a prolonged depression."). This woeful state of affairs created a strong buyer's market, reflected in various requests for proposals ("RFP"), or solicitations for contract bids, that the Navy issued in 1982. MTL bid unsuccessfully on two "major" ship procurement programs, as well as a third Navy contract, during the summer of 1982. *See* Dx 41 at 2 (Letter from James H. Rand to MMP (Jan. 7, 1983)). MTL "bec[a]me aware" that a union with which it did not contract "made substantial concessions to the companies with which it has collective bargaining agreements. . . . These concessions, which were applicable to both [sic] deck, engineer-

ing and radio officers, had the effect of reducing charter hire [costs] to the Navy by thousands of dollars per day." *Id.* In fact, in 1982 the Navy awarded contracts to ships having contracts with the MMP only because the United States Government faced "substantial prospective losses" if the Navy awarded those contracts to others. *See id.*

MTL believed that the Navy would not routinely renew its Navy Contract in 1983, but would instead put it up for competitive bidding, and indeed, it learned that the Navy intended to issue an RFP for the Sealift tankers contract, the Navy Contract. MTL knew that it could not be the successful bidder without reducing its labor costs.

MTL expressed grave concern about the potential loss of the Navy Contract. "In ordinary times, the loss of this business would be hard for MTL to bear and might well result in the financial insolvency of MTL." *Id.* Loss of the Navy Contract would "reduce MTL's operating cash flow of [sic] 40-50%." Px 30 at 2 (Memorandum from James H. Rand to file (Dec. 2, 1982)). In addition, MTL faced "special circumstances" during 1982. *See* Dx 41 at 2. Loss of the Navy Contract most likely would have caused a commercial lender, Irving Trust Company (coincidentally the trustee of a partnership owning the Sealift tankers, *see* Dx 14 at para. 2(a)), to refuse to lend ten million dollars to MTL to assist MTL to acquire a United States flag bulkcarrier named the "Marine Princess." *See* Dx 41 at 3; Px 30 at 2. In turn, MTL would lose fifteen million dollars that another lender was prepared to make available, *see* Dx 41 at 3, and thus would be unable to purchase the ship. Additionally, MTL's corporate parent, GATX Corporation, which had announced on June 28, 1982 that it would "distribute the stock of MTL to the GATX shareholders at or near the end of 1982," would not "spin off" MTL. *See id.* at 2-3. Instead, GATX "would proceed to liquidate MTL's assets promptly." *Id.* at 3; *see id.* at 2. GATX was determined "to withdraw from the ocean shipping industry." *Id.* at 2. "[T]he non-extension of the Navy Contract would have had a *catastrophic* effect upon [MTL]." Dx 42 (draft Memorandum of Sealift Agreement accompanying June 6, 1983 letter from Thomas E. Murphy,

MTL Manager, Marine Personnel Div. to Captain Robert J. Lowen, International President, MMP) (emphasis added).

MTL concluded that it needed to reduce Schedule A's total wages by approximately three thousand dollars per day in order for the Navy to routinely renew the Navy Contract without resorting to the RFP process. Before MTL could present a reduced Schedule A to the Navy, it of course needed to secure concessions from the four unions supplying manpower to the Sealift tankers.

Thomas Murphy, at the time MTL's "manager of the Marine Personnel Department," Tr. 555, was responsible for the Employer's collective bargaining. *See id.* Murphy determined that four steps were necessary if MTL was to achieve the necessary labor cost savings: wages must be "rolled back" to their level of June 16, 1981, and remain at that level through the duration of the upcoming extension; a certain allowance contained in the Master Agreement, called the "diesel and automation allowance," must be inapplicable to the Sealift tankers; vacation entitlements must be cut drastically (from 30 to 13 days for each 30 days of employment for ship "Masters," or captains, and from 27 or 26 days to 13 days for each 30 days of employment for other MMP members (collectively the "licensed deck officers," or "L.D.O.s"), *see* Dx 43 at § XXVIII(1)(b) (1981-'84 Master Agreement)); and necessary job-related travel must be made by economy class, rather than first class. *See* Tr. 557-58. These reductions, by themselves and through their "rippling effect" on wage-driven benefits, such as pension and the Feinberg Award, would allow MTL to remain competitive for the Navy Contract. Having already met with representatives of one of the other three unions providing manpower for the Sealift tankers, Murphy called on Captain Robert Lowen, International President of MMP, in the early fall of 1982.

Lowen understood that MTL wanted, in effect, to wipe out the aggregate compounded wage increase of 27½% since June, 1981 and cancel the 7½% increase anticipated for the following June. Additionally, cost of living increases due would be eliminated. *See* Tr. 197-98. Capt. Lowen characterized the wage reductions aptly as "brutal, brutal hits," *id.* at 198, "almost

unbelievable hits." *Id.* Lowen was concerned also that the reduction in vacation days would be extremely problematic, because it tied in to credit towards pension. *See id.* at 199. Murphy, however, told Lowen of MTL's lack of success earlier that year on other Navy contracts, and grimly warned Lowen that MMP

> either swallowed very, very hard, extended the contract for two years by amending at least the provisions that [MTL] w[as] worried about, and we had the jobs for two more years. Or, he said, [MTL and MMP] take the chance of putting [the 1983-'85 extension of the Navy Contract] out to bid and we know that whatever [the cost] is now, it's going to end up less, and [MMP] do[es]n't have the assurance of the jobs.

Tr. 203-04.

Lowen, Murphy, and possibly others had more discussions about these proposals during the month of October. *See* Tr. 205. An important face-to-face meeting occurred subsequently, on November 15, 1982,[5] *see* Tr. 671; *id.* at 997, at MMP's headquarters. Lowen, Murphy, James Rand, MTL's President, and Allan Scott, MMP's Vice President, attended this meeting. *See* Tr. 205. The parties discussed MTL's proposals, "which in affect [sic] w[ould] amend the [Master Agreement] so that we could remove the Sealift ships for a period of two years, and lock them up, so that they would not be touched," according to Captain Lowen. Tr. 206. Lowen apparently was shown a copy of a letter MTL had submitted to the Navy on November 12, in which MTL falsely stated that it already had its unions' agreement to wage concessions, *see supra* note 5, and offered to hold Schedule A "firm for the option period 1983-1985." *See* Dx 2 (Letter from H.A. Downing, MTL Executive Vice President, to

---

5 As the meeting between MTL and MMP occurred on the Monday following a key meeting between MTL officials and the Military Sealift Command, November 12, 1982, *see* discussion *infra* in the text at 15-16, MTL's statement to MSC in a letter dated November 12 that by then MTL had its "unions' agreement for the lower wages during the period [of the 1983-'85 extension of the Navy Contract]," *see* Dx 2 at 1, was false.

Admiral K.J. Carroll, Military Sealift Command (Nov. 12, 1982)). Lowen asked whether the escalation provision of the original Navy Contract would apply. One of MTL's representatives told him it would not. *See* Tr. 346 (quoting Lowen deposition testimony). This meant that MTL would not be able to submit revised Schedules A to the Navy during the 1983-'85 option period for the Navy Contract. MTL would continue to recapture actual costs above the Contract Price through escalation, but the amount recoverable through the escalation provision of the Navy Contract would be frozen. *See generally* discussion *infra* at 50-69. Lowen told Rand and Murphy that he found this "hard to believe." *See id.* at 347 (quoting Lowen deposition testimony).

Nevertheless, at the end of this meeting MMP agreed to accept MTL's proposals. MMP did, however, manage to extract one concession from MTL. MMP, as well as the other unions, apparently, negotiated the right to shift costs around, to make "future changes in the various benefits as [MMP] may desire so long as the total compensation remains unaffected." Dx 6 at 2 (Letter from James H. Rand to Commander, Military Sealift Command (Nov. 22, 1982)). The parties did not execute a writing to reflect their agreement.

C. MTL's Negotiations With the Navy

At the same time MTL was obtaining its unions' agreements to the concessions set forth above, it was engaged in discussions with the Navy regarding the 1983-'85 extension of the Navy Contract. As early as August 12, 1982, Rand discussed the extension of the Navy Contract with MSC officials. *See* Rand Dep. 51-52. In a letter dated October 26, 1982, MTL stated to the Navy its belief "that the Navy is considering putting the [Navy] [C]ontract out for bid in the near future." Dx 1 (Letter from H.A. Downing to Commander, Military Sealift Command (Oct. 26, 1982)). MTL asked the Navy to consider the proposal included in the letter before putting the contract out for bid. *See id.* The letter included two offers by MTL.

First, MTL submitted a ***handwritten*** revised Schedule A which reflected the concessions it was in the process of obtain-

ing from its unions. The letter stated: "The changes in Schedule A (total wages) represented by these concessions (almost 35% of the total wages) reduces the operating costs by almost $1 million per Vessel per year as compared with our present Schedule A." *Id.* Michael C. Berkowitz, the composer of the October 26 letter, *see* Tr. 1114, then MTL's general counsel, *see id.* at 1112, asserted at the trial that he used the term "total wages" to "refer specifically to the Schedule A total wages from the [Navy] [C]ontract and so I used the term together with the Schedule A in the parenthesis to indicate that I was specifically referring to the Navy [C]ontract and that very limited definition, specific definition set forth I think in Article 31" of the Navy Contract. Tr. 1119. The "very limited," "specific" definition that Berkowitz referred to reads, in relevant part:

> [T]he term "total wages" includes but is not limited to basic wages, pension and welfare costs, vacation pay, and any other fringe benefits or other payments, paid as a result of collective bargaining agreements, and overtime at the agreed percentage of 120% of base wages for licensed officers, excluding Masters and Chief Engineers, and 100% of base wages for unlicensed personnel vice [sic] actual overtime for each department of the tanker, and related taxes, *all as set forth in Schedule A*.

Dx 15 (Navy Contract) Art. 31(b)(i) (emphasis added).

Second, MTL offered to restructure its contractual relationship with the Navy, proposing to incorporate into the Navy Contract some of the requirements the Navy had included in recent RFPs for other contracts. Tr. 1041. This second proposal "would have required a two party negotiation," *id.* at 1041-42, which the Navy rejected because, due to time constraints, "any negotiations about revisions in the [Navy] [C]ontract might lend the appearance of a quid pro quo." *Id.* at 1042.

Still, the Navy expressed interest in MTL's first proposal. *See id.* On November 12, 1982, Berkowitz and Captain Henry Downing, who was then an Executive Vice President of MTL, and MTL's second-ranking operating officer behind Rand, *see* Rand Dep. 8, traveled to the offices of the Military Sealift Command in Washington, D.C., to meet with MSC officials.

See Tr. 43. They delivered to the Navy, on MTL's behalf, a letter from Capt. Downing in which MTL waived the ninety-day notice period contained in Article 4(b) of the Navy Contract.[6] *See* Dx 2 at 1; Dx 14 at Reference (A). MTL did this because the Navy was

> required to give [MTL] a 90-day notice if they were going to put out a new RFP and our concern was that that requirement would force them to go ahead and put out a new RFP without having time to fully evaluate our offer to renew the contract under the conditions that we were offering them.

Tr. 45. Although notice would have been due to MTL by February 7, 1983, *see* Dx 14 at Reference (A), receipt of the November 12 letter waiving notice apparently encouraged the Navy to move up the time when it would put out a RFP, because MTL later operated under the belief that the Navy would proceed to put out the RFP on December 1, 1982. *See* Tr. 216; *id.* at 593-94; *id.* at 676. In any event, there is no dispute that MTL was operating under severe time pressure, both from the Navy and from GATX.

Downing's impression of the November 12 meeting was that the Navy was "willing to continue the discussion" of MTL's proposal. Tr. 44. Because MTL had to act quickly, Downing and Berkowitz went immediately to counsel's offices at the conclusion of the meeting. *See* Tr. 1119-20. Berkowitz either wrote out "in longhand," or "dictated," *see* Tr. 1119-20, a letter to Admiral Carroll thanking MSC for the meeting. *See* Dx 2 at 1. Attached to the letter were two different typewritten proposed Schedules A. *See id.* (attachments). The letter advised MSC: "Both sets of figures [on the proposed Schedules A] are firm for the option period 1983-1985, and we have our unions' agreement for the lower wages during the period." *Id.* at 1.

---

6 Article 4(b) reads, in relevant part:

> The Government shall exercise . . . options [to extend the Navy Contract] by giving notice confirmed in writing, not less than 90 days prior to the termination of the then current contract period.

Dx 15 Art. 4(b).

On the following Monday, November 15, 1982, probably after meeting with Lowen, *see* discussion *supra* at 12-13, MTL sent MSC a telex in Capt. Downing's name, though Downing "probably" did not author the telex. *See* Tr. 52-53 & Dx. 5. The telex stated that MTL was "pleased to advise that Schedule A, delivered with our letter [dated] 12 November 1982, is firm through May 1985." Dx 5.

The same day James Rand sent another telex to MSC. This telex notified the Navy in writing of an extra benefit MTL would confer in order to retain the Navy Contract for the next two-year period, *i.e.*, it would implement the new labor costs on January 1, 1983, rather than on May 7, 1983, when the 1983-'85 extension would begin. *See* Dx 3 ("We are pleased to report to you that our unions have agreed that the prices reflected in our letter [dated] 12 Nov 82 and hand delivered to your office on that day shall be effective as from 01 Jan 1983."). This was confirmed by letter the next day. *See* Dx 4 (Letter from J.H. Rand to Admiral K.J. Carroll (Nov. 16, 1982)).

Finally, on November 22, 1982, MTL sent MSC a letter, apparently authored solely by Rand, *see* Tr. 1063-64, with input from Murphy.[7] *See id.* at 1064. The November 22 letter represented official notification, as required by Article 6(k) of the Navy Contract, that MTL had "amended [its] union contracts," effective January 1, 1983. *See* Dx 6 at 1. The letter went on to list the modifications obtained, after which it stated: "All of the unions have agreed to hold total compensation levels firm through May 7, 1985, although we have agreed to such future changes in the various benefits as the unions may desire so long as the total compensation remains unaffected." Dx 6 at 2. MTL did not send a copy of this letter to MMP. *See* Tr. 221-22.

---

7 Murphy testified that he did not speak directly to Rand. Rather, Murphy discussed the union agreements orally with Berkowitz. *See* Tr. 582-84. Berkowitz apparently spoke with Rand, because he testified that he did not recall drafting the November 22, 1982 letter (Dx 6). *See* Tr. 1137. Murphy, coincidentally, "believe[s]" he saw the November 22 letter before it was mailed, *see* Tr. 582, but does not have a recollection of "reviewing the letter" before it was mailed. *Id.* at 584.

D. The Second Round of Talks With MMP

After Lowen had agreed to MTL's proposal at the November meeting at MMP headquarters, MMP began notifying members of the Offshore Advisory Council of the terms Lowen had agreed to. *See* Tr. 211. "[I]t became apparent very rapidly that there was going to be a lot of trouble." *Id.* The entire MMP membership had recently approved a change in its rules, adopting what has been referred to as the "hardship rule." That rule states, in relevant part:

> [T]he International President, in consultation with the Offshore Advisory Council [is provided] with ongoing authorization to amend or defer the wages, hours or working conditions of the Master Offshore Contract for a financially ailing company signatory thereto, and the ongoing authorization to amend the agreement with an individual company with contract terms other than those of the Master Offshore Contract for the specific purpose of staving off financial insolvency.
>
> The company's financial hardship shall be proved to the satisfaction of the Organization prior to any amendment or deferral of contract terms. Any such amendment or deferral shall only be for a temporary period of time as determined by the President and any such amendment may be made with or without security and for other good and valuable considerations.

Dx 53; *see* Tr. 184-85; *id.* at 214. The hardship rule provided the only authorization for the International President, in consultation with the Offshore Advisory Council, to amend a previously ratified contract. *See* Tr. 182-85. Members of the Offshore Advisory Council complained, correctly, that MMP had not received any written evidence to support MTL's claim of hardship. *See id.* at 212-15.

After speaking with counsel, *see id.* at 213, Capt. Lowen, on his way to his home in California for Thanksgiving, asked Lloyd Martin, MMP's International Secretary-Treasurer, *see* Martin Dep. 5, to call MTL to tell them that Lowen believed he may have acted improperly in unilaterally, and without docu-

mentary support, agreeing to MTL's proposals. *See* Tr. 213-14. Martin called Murphy the Wednesday before Thanksgiving, November 24. Murphy testified that Martin said he would see Lowen in San Francisco and would try to get written confirmation of MMP's agreement, which MTL had to give to the Navy. *See* Tr. 676.

The day after Thanksgiving, November 26, Martin called Murphy again. *Id.* Martin said he was having lunch with Lowen and that Lowen had asked Martin to call Murphy to say he could not go through with the deal. *Id.* Murphy was "shocked, surprised." *Id.* Martin said Lowen would not speak to Murphy directly. *See id.* Murphy called Rand to inform him of this turn of events. *See id.* at 977. Rand spoke with Lowen on the telephone. *See* Tr. 215-16; *id.* at 978. Rand "demanded a meeting." *Id.* at 978. Rand "didn't offer [Lowen] a chance to say very much." *Id.* Rand "was willing to go anywhere to have the conversations" and "proposed to come out to San Francisco and see [Lowen]." *Id.* at 979. The time pressures on MTL were great because MTL had been told by MSC that it should have written confirmation of the unions' agreements to MSC by November 26. *See* Px 30 at 1.

The meeting occurred Thanksgiving weekend,[8] at the offices of MMP's San Francisco local. Lowen, Martin, and Bill Lar-

---

8 While Lowen believes the meeting occurred on Sunday, *see* Tr. 218, and Lloyd Martin, who also attended the meeting, *see* Tr. 220, believes it took place on Saturday, *see* Martin Dep. 81, both stated that the MMP San Francisco office, where the meeting was held, was closed. *See* Tr. 226 (Lowen); Martin Dep. 81. On the other hand, Murphy contradicted himself, at first stating that the meeting took place "[t]he weekend following Thanksgiving," Tr. 675, but later stating that the meeting occurred on Monday, November 29. *See id.* at 677. Rand testified that the meeting occurred on the 29th. *See id.* at 979. Rand and Murphy's version appears at first to be supported by a letter of that date, discussed *infra* in the text at 21-22, that Lowen provided Rand. *See* Dx 39. Actually, the letter also supports Lowen and Martin's version. Lowen testified that he typed the letter himself. *See* Tr. 226. Martin testified that while one secretary was called in to the office, she did not do any typing. *See* Martin Dep. 81. The document supports this. On inspection, it is obvious that the letter "d" in the word "amendments" beginning at the end of the third line of text of the letter is typed over either an "e" or an "s." *See* Dx 39. No competent secretary would leave a letter

sen, MMP's west coast Vice President, *see* Tr. 220, met Rand and Murphy. Martin later stated that Rand "was in a very high tension hyperventilation [sic] state of mind and almost to the point where we thought he might pass out from sheer excitement and tension." Martin Dep. 82. Lowen described Rand's presentation as "passion[ate]." *See* Tr. 220. Both Martin and Lowen agree Rand stated something to the effect that GATX would liquidate MTL if MTL did not secure the extension of the Navy Contract. *See* Tr. 217-18; Martin Dep. 82; *see also* Dx 41 (Letter from Rand to Lowen at 3 (Jan. 7, 1983)) (ultimate result of chain of consequences that would occur if MTL did not secure the extension of the Navy Contract would be that "GATX would proceed to liquidate MTL's assets promptly"); *cf.* Tr. 979 (Rand testimony) ("I took the opportunity to bring [Lowen] up to date with my conversations with MTL's sole shareholder and was able to share with him my own estimation of what the consequences, in a dim natural sort of sense, one thing leading to another, what the consequences might be on the company of Captain Lowen reneging on his agreement, we not getting the renewal on the [Navy] [C]ontract.").

After Lowen had discussed the matter with Martin and Larsen to satisfy himself that MTL qualified under MMP's hardship rule, *see* Tr. 220, Murphy gave Lowen a draft of a letter, which had been composed either by Rand or Berkowitz, *see id.* at 593-94, that MTL needed to provide to MSC. *See id.* at 226. Murphy stated that MTL was "very anxious" to have Lowen provide this letter. Tr. 593. Lowen provided the letter, which stated that Lowen had reviewed MTL's November 22 letter to MSC, and that the November 22 letter correctly summarized the amendments made to the Master Agreement, *see* Dx 39, typing it himself. *See* Tr. 226; discussion *supra* note 8. Lowen hand delivered the letter right there, because Rand and Murphy indi-

---

that way. Second, there are no typist's initials on the lower left-hand side of the letter, where they would appear normally. Further, MMP wanted written confirmation of Rand's explanation of the consequences to MTL from loss of the Navy Contract, to comply with the hardship rule. One could not be composed at the meeting because there was no secretarial help available. *See* Tr. 231.

cated "that they could not leave that office without hand carrying the letter." Tr. 230. Furthermore, Rand agreed to provide MMP with a written explanation of the potentially disastrous consequences that MTL would likely suffer if it lost the Navy Contract. *See* Tr. 231. The letter was eventually provided. *See* Dx 41.

E. The 1983-'85 Navy Contract Extension Confirmed

On November 29, 1982, two Navy contract specialists signed a memorandum for internal files on the subject of "Justification for Exercise of Third Option to extend Contract for Operation of the Sealift Class Tankers." *See generally* Dx 14. The memorandum referred, *inter alia*, to MTL's November 12 letter stating that "[b]oth sets of figures[, contained in Schedules A-1 and A-2,] are firm for the option period 1983-1985." *See* Dx 14 at para. 3(b). The memorandum stated: "[U]nder the revision of MTL's Schedule A which is to become effective on 1 January 1983, total wages (including fringe benefits) will actually decrease by approximately 30 percent in comparison with the currently effective Schedule A." *Id.* para. 3(b). After making various cost calculations and comparisons, *see id.* paras. 7-11, the memorandum concluded that "exercise of the [two-year] option [wa]s the most advantageous method of fulfilling the Government's need" for the services the Sealift tankers provided. *See id.* para. 14. Specifically, because the figures on the new Schedule A would not change during the period of the extension, and the base "Contract Price" could "be estimated with a fair degree of certainty," *see* Dx 14 at para. 3(a), the Navy calculated the two-year "per diem," or total cost to the Navy, of the extension. *See id.* at para. 7.

On December 1, 1982, Military Sealift Command sent MTL a telex notifying MTL of the Navy's decision to exercise its third option for the Navy Contract, for the period May 7, 1983 to midnight May 6, 1985. *See* Dx 7. Rand sent a message to all the Sealift tankers the next day to detail the concessions. *See* Px 49 Ex. I at 4 (Telex from Lowen to Sealift Deck Officers (Dec. 24, 1982)). The Navy telex was followed by a letter dated December

9, 1982[9] from Vice Admiral Carroll. *See* Dx 8. The letter "serve[d] to confirm essential points of understanding and agreement regarding the Government's acceptance of certain voluntary proposals recently submitted by MTL affecting manning and contract payments effective as of 1 January 1983." *Id.* at 1. MSC accepted "the revision of Schedule A recently submitted by MTL marked and identified as 'Exhibit A-2 for 1983-1985.' . . . It is understood this Revised Schedule A will remain firm from 1 January 1983 through May 1985 " *Id.* at 2.

On December 22, 1982, Rand sent a letter to the Commander, Military Sealift Command, acknowledging receipt of Vice Admiral Carroll's letter and agreeing to the Navy's terms. *See* Dx 9. MTL specifically "thank[ed] MSC for its acceptance of revised Schedule A." *Id.* at 2.

F. The Foreign Articles Problem

On Christmas Eve, 1982, Capt. Lowen sent a telex to all Sealift Deck Officers to explain the circumstances leading to, and to restate the particulars of, MMP's concessions to MTL. *See* Px 49 Ex. I; Px 50. The telex urged

> all Masters that the terms and conditions under which officers and crew signed Articles should be adhered to until Articles are broken in a U.S. port. Upon voyage completion, or until the terms of the Articles run in the event of non-return in accordance with the relevant portions of the U.S. Code. [sic] *If there is a dispute concerning overpayment by a Master, MTL and the Navy can argue out whether or not a Master can be ordered to violate a stature [sic] of the United States Code.*

Px 49 Ex. I at 4 (emphasis added). Capt. Lowen in substance said that it would be illegal for MTL to impose the wage reductions on those men working on board any of the Sealift tankers as of January 1, 1983.

---

9 The copy of the letter provided to the court is undated. *See* Dx 8. The date is taken from Dx 9, Rand's responsive letter of December 22, 1982. *See id.*

MTL soon recognized that, in its haste to secure the extension of the Navy Contract, it had agreed to reduce wage costs to the Navy as of January first, despite its obligation to pay current wages to the employees working under the "foreign articles," to which Lowen had referred in his December 24 telex, for the duration of their then current voyages. On December 30, 1982, J.M. MacAulay, Fleet Director for the Sealift vessels, *see* Tr. 264-65, wrote MSC to advise MSC: "As some vessels are presently on foreign articles operating offshore, there will be some time delay for some vessels until their return to a U.S. port or when one year articles are terminated." Dx 10 at 1 (Letter from J.M. MacAulay to Department of the Navy (Dec. 30, 1982)). MacAulay apparently had been given the task of persuading the Navy to absorb these labor costs, because he had played no role in negotiating the extension of the Navy Contract. *See* Tr. 300. The letter stated that crew members under foreign articles "will have legal rights to entitlements of existing pay scale, which will present some difficulties in instituting the new [S]chedule [A] on 1 January 1983." Dx 10 at 1. MTL predicted an average cost overrun "of approximately 4 months when wages of those existing crew members now on foreign articles will continue." The letter ended with MTL asking the Navy to modify the Navy Contract: "Your understanding and agreement to the schedule we intend to follow with the Sealift vessels will be greatly appreciated." *Id.* at 3.

Admiral Carroll responded to MacAulay's letter in a letter dated January 19, 1983.[10] *See* Dx 11. He stated, in relevant part, that

> MTL notified MSC in previous correspondence, particularly your letter of November 22, 1982, that the effective date for the reduced wages identified in Exhibits A-1 and A-2 for 1983-1985 attached to your letter of November 12, 1982 would be 1 January 1983. The option to extend the contract period for an additional two years was predicated on this understanding. As MSC has historically paid all wage increases in accordance with Article 31, Escalation,

10 The court's copy is not clear as to the date. The date is taken from MMP's index of trial exhibits.

> on the effective date stated in existing collective bargaining agreements, we do not agree with your position that the new wage rates will not be effected until Foreign Articles are broken.

Id.

Rand testified that within a few days of receipt of the January 19 letter, he called Admiral Carroll to explain MTL's position, and, after a briefing from his attorney, gave Admiral Carroll "an informal legal briefing on foreign articles." *See* Tr. 1103-05. Rand gave the following testimony:

> Q. Admiral Carroll told you he was going to go ahead and pay the bill?
> A. Right.
> Q. He didn't tell you why he was going to pay?
> A. No.
> Q. Did you have an impression from Admiral Carroll as to why he agreed to pay the bill after telling you in a letter just a few days before that he wasn't going to pay the bill?
> A. Because he admitted he owed it.

Tr. 1106.

This testimony is not entirely consistent with the documentary evidence presented to the court. On February 11, 1983, Rand signed a letter to Vice Admiral Carroll. *See* Dx 12. The letter began: "In view of the assorted complexities contained in the [Navy] Contract, I have asked my staff to assess the contents in your letter of 19 January 1983 and prepare for me a formal response." *See id.* at 1. The letter acknowledged that the problem of reducing the wages of crew members on foreign articles "was unexpected by either MTL or its unions at the time of our proposal." *Id.* at 3. MTL estimated the cost difference to be "between $600,000 and $900,000." *Id.* at 4. "MTL c[ould] ill afford to suffer a loss of this magnitude." *Id.* MTL "request[ed] relief from the government on a dollar for dollar basis in lieu of MTL attempting to absorb these extraordinary costs." *Id.* MTL felt it "should not be held liable for the legally binding implications of the [foreign] articles which were not

anticipated by either party at the time the proposal [for extension of the Navy Contract] was accepted." *Id.*

On April 15, 1983, Admiral Carroll responded to the February 11 letter. *See* Dx 13. The letter granted MTL's request for monetary relief, "estimated to amount to $600,000." *Id.*

G. The June 1983 Memorandum

In a letter dated June 6, 1983, Thomas Murphy wrote Capt. Lowen to inform him that "Military Sealift Command require[d] formal Agreements respecting the contract changes pertaining to the Sealift Tankers. This [wa]s necessary for billing purposes." Dx 42. The letter included a draft agreement, reproduced in the margin.[11] *See id.* The draft had been prepared

---

11 The June 6 draft reads, in relevant part:

DRAFT
MEMORANDUM OF AGREEMENT

This AGREEMENT made as of the 1st day of January, 1983, by and between Marine Transport Management, Inc. (formerly named Marine Transport Lines, Inc.) (the "Company") and the International Organization of Masters, Mates and Pilots, (herein "Organization").

WITNESSETH THAT

WHEREAS, the Company's contract (the ["]Navy Contract") with the United States of America to operate nine Sealift class tankers (the "Tankers["]) has been extended to and including May 7, 1985;

WHEREAS, the Organization has been recognized as the sole collective bargaining agent for the licensed Deck Officers aboard all vessels operated by the Company including the Tankers and the parties have entered into a standard collective bargaining agreement (the "Standard Agreement") dated June 16, 1981;

WHEREAS, the Company has represented to the Organization that in the Company's Judgement the Navy Contract would not have been extended if the terms and conditions of the Standard Agreement were applicable to the Navy Contract for the term of this Agreement and, because of the planned spin-off of the Company from it's [sic] corporate parent and a pending financing the non-extension of the Navy Contract would have had a catastrophic effect upon the Company; and

(*Footnote continued*)

by Murphy and Berkowitz. *See* Murphy Dep. at 146-47; Tr. 605. Lowen testified that he agreed that the draft embodied MMP's agreement with MTL. He would have signed the June 6 draft but for the inclusion of a paragraph that is irrelevant to this action. *See* Tr. 384-85; *id.* at 424. The irrelevant paragraph, however, made Lowen "s[ee] red." *Id.* at 235-36. For that reason, the June 6 draft "did not get signed. And [Lowen] could think of no other document that was signed." Tr. 235. Curiously, it appears that "there was never any communication between the parties [on the subject of the draft] after" the June 6 letter was sent. *See* Tr. 601 & 619 (Murphy testimony). It also appears that there never were any conversations with the Navy

---

WHEREAS, in light of the foregoing circumstances the parties wish to effect certain changes in the wages, hours and working conditions which shall be applicable to the licensed Deck Officers employed aboard the Tankers;

NOW, THEREFORE, in consideration of the premises and other good and valuable consideration, the receipt and sufficiency whereof are acknowledged, it is hereby agreed as follows[:]

1. The term of this Agreement shall commence as of the date first written above [and] shall end on May 8, 1985.

2. All wages, overtime, penalty rates etc. applicable to the Tankers shall be and shall remain during the Term the rates that were in effect on June 16, 1981.

3. The diesel and automation rates set forth in Section VIII 1. Second and Third paragraph of the Standard Agreement shall not be applicable to the Tankers.

4. The vacation schedule under Section XXVIII shall be amended to cover all licensed Deck Officers accruing 13 days vacation for each 30 days employment.

5. Transportation benefits under Section II 5 and Section XX will be economy class.

6. . . .

MARINE TRANSPORT MANAGEMENT, INC.	INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS, AFLCIO
BY: _____	BY: _____

The court notes that the draft says May 8, while the actual date of expiration of the Navy Contract is May 7. *See* Dx 14. The difference is *de minimis*.

about the fact that the draft agreement had not been signed. *See* Murphy Dep. 121. Nevertheless, the concessions that had been negotiated in 1982 were implemented. *See* Tr. 236.

H. Events in 1984

In a letter dated March 12, 1984, Murphy wrote Lowen to inform MMP that MTL intended to offer the Navy a proposal in response to the Navy's solicitation for bids on a new contract. *See* Px 49 Ex. O at 1. The letter outlined the labor costs that MTL planned to include. *See id.* at 1-2. These costs differed from those contained in the Master Agreement. The letter ended with MTL's hope that MTL's offer would "be favorably received" by MMP and, subsequently, the Navy. *See id.* at 2.

On March 19, 1984, Murphy sent Lowen a second letter regarding another Navy contract that was "up for grabs." *See* Murphy Dep. Ex. H. The letter warned ominously that "[t]here is every indication that companies with labor organizations different from" MTL's unions would "be going after this business." *Id.* The letter included an attachment that compared MTL's "current payroll cost," Schedule A, and the figures the Employer felt it would have to bid at to win the contract. There is a difference per ship per month of $15,591.18. *See id.*

On March 30, 1984, Murphy sent Lowen another letter. *See* Px 49 Ex. P. This letter referred to the contracts referenced in the March 12 and March 19 letters, and a third contract as well. *See id.* The March 30 letter stated that it was "a follow-up" to a telephone conversation between Murphy and Lowen that had occurred on March 29. *See id.* The letter stated:

> Military Sealift Command continues to insist that we must have written confirmation from our unions indicating approval of our offer. Enclosed is a letter that MM&P gave us last year when we were going after the C-3 vessels. I believe a similar letter having to do with the above RFP's would be acceptable to Military Sealift Command. Obviously, it will be disheartening if the Navy considered our Company non responsive [sic] simply because we did not have a letter.

Px 49, Ex. P.

On April 2, 1984, Captain Lowen provided the letter Murphy requested, for all three contracts. *See id.* Ex. Q.

On April 8, 1984, MMP gave notice to all employers who had agreed to the Master Agreement of its intention to modify and amend the Master Agreement, set to expire at midnight June 15, 1984. *See* Px 17. The notice was sent to "Marine Transport Lines—USN." *See id.*; Tr. 455. Marine Transport Lines—USN apparently is a subsidiary of MTL that manages the operation of the Sealift vessels, though this is unclear. *See* Tr. 463 (quoting Px 49 (Lowen Affidavit) at para. 40). It is located at the same address as MTL. *See* Px 17.

Murphy wrote Lowen again on May 10, 1984. *See* Px 49 Ex. R. Murphy's May 10 letter stated that the Navy required something more specific than Lowen's April 2 letters. Murphy included a draft that MTL believed would satisfy the Navy. *See id.* The letter further stated that MTL had to have the letter, "or something similar," by May 15th. *See id.* Capt. Lowen provided a letter that met MTL's requirements on May 15th. *See* Px 49 Ex. S. In fact, Murphy testified that he could not recall, either way, whether MMP ever refused, during 1984, to give MTL any letter it needed to bid on a Navy contract. *See* Murphy Dep. 79.

On June 6, 1984, Murphy wrote Eugene O'Connor, Vice President & Executive Secretary of Tanker Service Committee, Inc., the bargaining agent for all employers who were parties to the Master Agreement. *See* Dx 48. MTL informed O'Connor that MTL was withdrawing the Tanker Service Committee's authority to negotiate on MTL's behalf towards any new or modified or extended Master Agreement, or to negotiate with any labor organization other than the National Maritime Union. *See id.*

On June 13, 1984, Lowen wrote Marine Transport Lines—USN notifying it, first, that the Master Agreement was being automatically renewed for one year, until June 16, 1985, and, second, that the Sealift Agreement ran until May 7, 1985. *See* Px 19. Lowen believed that, in the absence of a similar letter of renewal, directed to Marine Transport Lines, Inc., MTL had the right to serve a notice of termination of the Master Agreement as it applied to MTL's commercial fleet. *See* Tr. 501 &

Px 20. However, Lowen believed MTL had no right to terminate the Sealift Agreement on June 16, 1984. *See* Tr. 501. The purpose of Px 19, Lowen testified, was to extend the Sealift Agreement from May 7, 1985 to June 16, 1985, s , that it would expire simultaneously with the Master Agreement, as renewed. *See* Tr. 502.

On June 15, 1984, MTL sent a telex, under Rand's name, to "all ships in the MTL fleet (Officers and Unlicensed Personnel)." *See* Dx 45. The telex announced that MTL had entered new collective bargaining agreements with three of its unions, and that MTL "ha[d] not renewed [its] contractual relationship with the International Organization of Masters, Mates and Pilots and that contract w[ould] expire on midnight, Eastern Standard Time, on June 15, 1984." *Id.* at 1. The telex stated that "[t]he decision to change MTL's labor affiliation as regards deck officers was not made without careful thought." *Id.* "MTL's unions, *except for MM&P*, have been eager to meet the challenge [of a "depress[ed]" market for MTL's services]. *Only the MM&P has been recalcitrant.*" *Id.* at 2. (emphases added).

The telex invited certain MMP members, *see id.* at 3; Tr. at 771-72, to stay with MTL. *See* Dx 45 at 2. MTL offered to pay any fines MMP imposed on those choosing to remain with MTL so long as they took "reasonable steps to avoid or minimize the possibility of a fine by resigning from MM&P." *Id.* at 2. MTL, having learned from the foreign articles episode that MSC, *see* discussion *supra* Part F, also assured crew members that those on foreign articles would not have their terms of employment altered "for the duration of those articles." *Id.* at 3. The telex concluded with new work rules, or working conditions, for licensed deck officers, applicable on June 16, 1984. *See id.* at 3-7. MTL filed this action on June 16, 1984.

MMP members serving on the Sealift vessels were advised by the Union to continue working. MTL, however, stopped recognizing the Union, and refused to make payments towards various Union benefit plans. On October 3, 1984, Capt. Lowen sent a telex to "all MTL vessels" advising Union members to "cease all work of any kind except for that involving security of [the]

vessel," but to also remain on board the ships to protect their jobs. *See* Dx 46.

LEGAL ANALYSIS

It is important to recognize that this action involves three separate, yet intertwined, contracts—the Master Agreement, the Sealift Agreement, and the Navy Contract. MTL acknowledges that the Sealift Agreement exists, but insists that it must be limited to its specific terms. MTL cites the legal proposition that "a reference by the contracting parties to an extraneous writing *for a particular purpose* makes it a part of their agreement only for the purpose specified." *Guerini Stone Co. v. P.J. Carlin Constr. Co.*, 240 U.S. 264, 277 (1916) (emphasis added), *quoted in Lodges 743 & 1746, Int'l Ass'n of Machinists v. United Aircraft Corp.*, 534 F.2d 422, 441 (2d Cir. 1975), *cert. denied*, 429 U.S. 825 (1976); *see United States v. Foster Wheeler Corp.*, 639 F. Supp. 1266, 1270 (S.D.N.Y. 1986); *Rhode Island Hosp. Trust Nat'l Bank v. Ohio Casualty Ins. Co.*, 613 F. Supp. 1197, 1210 (D.R.I. 1985), *rev'd on other grounds*, 789 F.2d 74 (1st Cir. 1986).

This legal proposition is not, however, applicable to this action. It applies only where there exists two contracts which have distinct, though related, subject matters. *See, e.g., Guerini Stone Co.*, 240 U.S. at 265-66 (subcontract and main contract); *Lodges 743 & 1746, Int'l Ass'n of Machinists*, 534 F.2d at 429 (collective bargaining agreement and "Strike Settlement Agreement"); *Foster Wheeler Corp.*, 639 F. Supp. at 1267 (Letters of Commitment and Letters of Credit); *Rhode Island Hosp. Trust Nat'l Bank*, 613 F. Supp. at 1199-1202 (guaranty bond and distributor contract).

The Sealift Agreement, on the other hand, is indisputably a modification[12] of the Master Agreement. *See, e.g.*, Dx 42 (June 6, 1983 draft, *supra* note 11) ("WHEREAS, . . . the Navy Con-

12 Although the parties use the term "amend" or one of its variants almost exclusively, "amend" is synonymous with "modify." *See Webster's Third New International Dictionary* 68 (1986) (definition of amend); *Black's Law Dictionary* 74 (5th ed. 1979) (definition of amendment).

tract would not have been extended *if the terms and conditions of the [Master] Agreement were applicable to the Navy Contract for the term of this Agreement* . . . ; and WHEREAS, in light of the foregoing circumstances the parties wish to effect certain changes in the wages, hours, and working conditions [detailed in the Master Agreement]"); Dx 6 at 1 (Rand November 22 letter) ("we have amended our union contracts"); *id.* at 2 ("Formal amendments to the union contracts are expected in due course."); Dx 39 (Lowen November 29 letter (composed by MTL, *see* discussion *supra* at 21-22)) (Subject: "Sealift Operating Contract . . . Amendments to Union Contracts"); *id.* ("We have reviewed your letter of November 22, 1982 to Commander, Military Sealift Command, which letter summarized the negotiated amendments to the agreements [sic]. In our opinion you have correctly summarized those amendments."); Tr. 560 (testimony of Murphy, who negotiated the terms for MTL).

The modification is an oral one, as the parties never reduced the agreement to writing. *See* discussion *supra* Background Part G. A different rule of law than that cited by MTL applies to such a contract modification, which the court will explicate following a brief discussion of the appropriate standard of proof.

The parties disagree as to the standard, or burden, of proof that must be satisfied to show the terms of an oral modification[13] of a written contract. MTL argues that such terms must be proven by "clear and convincing" evidence. *See, e.g., Amerdyne Indus. v. Pom, Inc.*, 760 F.2d 875, 877 (8th Cir. 1985) (applying Arkansas law); *Standard Alliance Indus. v. Black Clawson Co.*, 587 F.2d 813, 829 (6th Cir. 1978) (applying Ohio law), *cert. denied*, 441 U.S. 923 (1979); *In re Indus. Car Mfg. Co.*, 1 Bankr. 339, 343 (Bankr. E.D. Pa. 1979) (applying Pennsylvania law); *Thaler v. I C I United States, Inc.*, 476 F. Supp. 67, 71 (W.D. Ky. 1979) (applying Kentucky law). MMP asserts that it need prove such terms by the usual civil evidentiary standard of the preponderance of the evidence. *See Barrett v. Bank of Am., N.T. & S.A.*, 183 Cal. App. 3d 1362, 1371, 229 Cal. Rptr. 16, 22 (4th Dist. Ct. App. 1986); *Sullivan v. Mosner*, 226

---

13 The parties do not dispute that "a written collective bargaining agreement can be orally modified." *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269, 1271 (9th Cir. 1979).

Md. 479, ____, 295 A.2d 482, 489 (1972). *See generally Addington v. Texas*, 441 U.S. 418, 423-24 (1979) (explaining that generally standard of proof in civil cases is mere preponderance of evidence, but that "clear, unequivocal and convincing" standard is sometimes applied "to protect particularly important individual interests in various civil cases").

The court need not decide the question. The existence of all *six* modifying terms in the Sealift Agreement are indeed proven by clear and convincing evidence. Those terms are: reduction of all wage rates, including penalty rates, premium rates, and the Master's Financial Responsibility Rate, to June 16, 1981 levels;[14] reduction of vacation benefits to 13 days for each 30 days of employment; elimination of the diesel and automation rates; transportation by economy class; a duration for the Sealift Agreement until May 7, 1985, *see, e.g.*, Dx 42, and the right of MMP to make "changes in the various benefits." *See, e.g.*, Dx 6 at 2. The content of the first five of these modifications is also proven by clear and convincing proof. The parties disagree as to the content of the sixth. MTL argues that MMP could change only the four substantive "benefits" modified by the Sealift Agreement, while MMP argues that "benefits" refers to everything in Schedule A. It is not necessary to resolve this disagreement, given the ultimate reasoning of the court's analysis.

MTL would have the court require MMP to show by clear and convincing proof that the terms of the Master Agreement *not* modified by the Sealift Agreement are incorporated into the Sealift Agreement. This misconstrues the applicable law. The applicable legal principle is so basic that it is nearly intuitive, and is stated infrequently. As the court stated succinctly in *Robinson v. Crosson*, 149 Colo. 235, 368 P.2d 791 (1962):

> Modifications do not necessarily abrogate the original contract entirely; indeed, the terms of the old contract are still to be followed so far as not changed or as inconsistent

---

14 MMP did argue that the wage agreement was much broader, but the documents show clearly that none of the rates of the various MMP benefit plans were reduced by the Sealift Agreement. *See* Dx 2 (Schedule A-2); Px 36 Chart 3 ("Comparison of Actual Benefit Fund Contributions to What Contributions Would Have Been if June 16, 1981 Rates Had Been Restored as of January 1, 1983 and Held Fixed").

> with the new terms, and the governing contract may be said to be composed of the new terms and the unchanged terms of the old. An intention to discharge the old contract is not presumed, and it must be made to appear that the parties intended to terminate the old contract in its entirety in order for it to be superceded completely by the new one.

149 Colo. at ____, 368 P.2d at 792-93, *quoted in Fellers-Schoonmaker Homes, Inc. v. Five Star Homes & Real Estate, Inc.*, 158 Colo. 163, ____, 405 P.2d 677, 682 (1965); *accord*, *Teal v. Bilby*, 123 U.S. 572, 578 (1887) ("It is hardly pretended by counsel . . . that it was not competent, after the written contract was made and signed by the parties, for them to make another verbal contract in regard to some parts of it, *which to that extent should be a substitute for the first one.*") (emphasis added); *Corr v. Hoffman*, 256 N.Y. 254, 258, 176 N.E. 383, 385 (1931) (where partnership continued after partnership for term ended, "the copartnership was terminable at will but, so long as it continued, the mutual rights and obligations of the partners remained as defined in the written contract, except in so far as particular provisions of the written articles might thereafter be modified by agreement or might be intended to apply only during the original fixed term") (dictum).

MTL cites *District 2, Marine Engineers Beneficial Association v. Falcon Carriers, Inc.*, 374 F. Supp. 1342 (S.D.N.Y. 1974), for the proposition that "[a]n oral agreement entered into during the period of a written collective bargaining agreement . . . may be incorporated into the written agreement only when it is not inconsistent with the provisions of the writing." *Id.* at 1348 n.2. MTL argues that the expiration date of the Sealift Agreement, May 7, 1985, cannot be applied to extend the terms of the Master Agreement not modified by the Sealift Agreement, which terms had an expiration date of June 16, 1984, because it is inconsistent with the termination date of the Master Agreement. The court declines to apply the stated principle to these facts.

First, neither *Falcon Carriers, Inc.* nor the authority it relies on, the Labor Relations Expediter, addresses the meaning of the term "inconsistent." Under MTL's interpretation, no sub-

ject covered by a written agreement could be modified orally, except if the oral terms embody a mirror image of the written terms, since any material variance can be denominated an inconsistency. Instead, MTL argues the written agreement could only be supplemented by the addition of completely new terms. Such a proposition is rejected implicitly by numerous cases recognizing that "a written collective bargaining agreement can be orally modified." *Certified Corp. v. Hawaii Teamsters & Allied Workers, Local 996*, 597 F.2d 1269, 1271 (9th Cir. 1979) (citing cases). Particularly relevant to this case, in *Certified Corporation* the Ninth Circuit held that a "written collective bargaining agreement . . . was orally modifiable as to duration." *Id.*; *see Trans, Inc. v. Gimbel Bros.*, No. 86-2247, slip op. (E.D. Pa. Feb. 25, 1988) (LEXIS, Genfed library, Courts file) (oral modification of duration term could be proven). The court notes that no reported case has followed *Falcon Carriers, Inc.* on this particular point.

Second, MTL's assertion of this proposition is wholly inconsistent with the central thrust of its case. To apply the proposition in a consistent manner, the court would have to hold that every term of the Sealift Agreement, including the agreement by MMP to accept lower wages, was and is unenforceable.

Third, the policy presumably undergirding the proposition stated in *Falcon Carriers, Inc.*, suspicion of untrustworthy oral agreements, and concern over the absence of sufficient expression of the parties' intent to alter the writing, is not at risk in this action. There is no dispute that the Sealift Agreement expired simultaneously with the Navy Contract's third extension. This has been proven by clear and convincing evidence. *See Trans, Inc.*, *supra* (oral modification of contract's duration term not proven by "clear, precise and convincing" evidence). Thus, the duration of the Master Agreement was extended in relation to the Sealift vessels, while the terms of the Master Agreement not modified were made applicable to those ships until the new termination date of May 7, 1985.

There is an alternative way to view the Sealift Agreement, which reaches the same result. The Sealift Agreement may be seen as a new collective bargaining agreement applicable to the Sealift tankers. "[A] collective bargaining agreement need not

be in writing in order to be enforceable." *Certified Corp.*, 597 F.2d at 1272; *see H.J. Heinz Co. v. NLRB*, 311 U.S. 514, 523-26 (1941); *Kaylor v. Crown Zellerbach, Inc.*, 643 F.2d 1362, 1367 (9th Cir. 1981); *Rabouin v. NLRB*, 195 F.2d 906, 910 (2d Cir. 1952); 29 U.S.C. § 158(d) (1982). Where two collective bargaining agreements are executed by the same parties and cover the same subject matter, the latter supercedes the former only as to inconsistent provisions in the two. *See NLRB v. International Union of Operating Eng'rs*, 323 F.2d 545, 546, 548 (9th Cir. 1963) ("The provisions of the[ ] two contracts are inconsistent with each other and since the contracts were entered into by the same parties and cover the same subject matter, it is a well settled principle of law that the later contract supercedes the former contract *as to inconsistent provisions.*") (emphasis added); *Bechtel Corp. v. Local 215, Laborers' Int'l Union of N. Am.*, 405 F. Supp. 370, 375 (M.D. Pa. 1975) ("When two parties . . . make a new agreement that is inconsistent with terms of a previous one dealing with the same subject matter, the later agreement operates to rescind and to discharge by substitution the inconsistent parts of the earlier contract."), *aff'd in relevant part*, 544 F.2d 1207 (3d Cir. 1976); *cf. Jersey Cent. Power & Light Co. v. Local Unions 327, 749, 1289, 1298, 1303, 1309 & 1314 of I.B.E.W.*, 508 F.2d 687, 702-033 & n.44 (3d Cir. 1975) (dictum) (speaking of conciliation agreement and collective bargaining agreement: "If the new agreement contains terms that are *clearly inconsistent* with the previously existing contract . . . , the fact of inconsistency is itself a sufficient indication of intention to abrogate the old and substitute the new. . . . It [the new agreement] *operates as a discharge by substitution only so far as the inconsistency extends.*") (emphases in original) (bracketed material in original) (ellipses in original) (quoting 6A Corbin, *Contracts* § 1296 (1962)), *vacated*, 425 U.S. 987 (1976).

But regardless of how the Sealift Agreement is viewed, the burden to show intent to supercede the provisions of the Master Agreement not addressed specifically in the Sealift Agreement rests with the party arguing for that result, MTL. The court presumes that on the issue of the applicable standard of proof on this point, the parties would switch arguments, the Union argu-

ing for application of the "clear and convincing" standard, and the Employer arguing for application of the "preponderance of the evidence" standard. Again, it is not necessary for the court to decide the question. MTL has failed to show by even a preponderance of the evidence an intent in the fall of 1982, when the Sealift Agreement was agreed to, to reject the provisions of the Master Agreement that were not modified. Both Rand and Murphy, the only MTL officials who dealt with Lowen, testified that during the 1982 negotiations they did not discuss with Lowen any aspects of the Master Agreement except those they needed to modify to secure the extension of the Navy Contract. *See* Tr. 625-27 (Murphy); *id.* at 678 (same witness, discussing San Francisco meeting specifically); *id.* at 681 (same witness); *id.* at 976 (Rand, discussing early November meeting). As a matter of undisputed fact, the parties abided by all terms of the Master Agreement, with the Sealift Agreement's specific modifications, from January 1, 1983 to June 15, 1984.

MTL presents five arguments for its theory of the case that the Sealift Agreement superceded in toto the Master Agreement, and was a free standing, complete and fully viable understanding, with only those elements of the Master Agreement necessary to carry out the Sealift Agreement incorporated into it.

MTL first argues that Lowen's April 8, 1984 to "Marine Transport Lines—USN" notifying MTL of the Union's desire to "modify and amend" the Master Agreement "which expires at midnight, June 15, 1984," *see* Px 17, demonstrates that the full Master Agreement was not intended to be incorporated into the Sealift Agreement. The difficulty with this interpretation is clear, since the Sealift Agreement expired on May 7, 1985, and it is questionable whether the notice was sent other than mistakenly. In this connection, Lowen testified that a secretary routinely sent out notices to every company with which MMP had a contract. *See* Tr. 455-64. "Marine Transport U.S.N." was listed as one of the participating employers in the Master Agreement. *See* Dx 43. The court accepts Lowen's testimony that this notice was sent mistakenly by MMP.

Furthermore, MTL would have been entitled to reject Lowen's letter and refuse to negotiate on new terms of the Mas-

ter Agreement, as those terms applied to the Sealift Agreement, since modification of any contract can occur only on the mutual agreement of the contracting parties to new terms.[15] *See Nyhus v. Travel Management Corp.*, 466 F.2d 440, 445 (D.C. Cir. 1972) ("The power to contract is also the power to modify the effect of prior agreements by mutual consent."). Witness the Sealift Agreement itself. Where there is no agreement to modify, the original terms remain in force. The Sealift Agreement ran from January 1, 1983 to May 7, 1985. Had MTL and MMP negotiated a new Master Agreement in 1984, MTL could have refused to apply those new terms to the Sealift tankers.

Finally, even if Lowen possessed this subjective view of the Sealift Agreement, he failed to express it in 1982, at the time the parties agreed to the modification. Because any such intent was not expressed, it is irrelevant.

> A contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent. If, however, it were proved by twenty bishops that either party, when he used the words, intended something else than the usual meaning which the law imposes upon them, he would still be held, unless there were some mutual mistake, or something else of the sort. Of course, if it appear by other words, or acts, of the parties, that they attribute a peculiar meaning to such words as they use in the contract, that meaning will prevail, but only by virtue of the other words, and not because of their unexpressed intent.

Hotchkiss v. National City Bank, 200 F. 287, 293 (S.D.N.Y. 1911) (L. Hand, J.), *aff'd*, 201 F. 664 (2d Cir. 1912), *aff'd*, 231 U.S. 50 (1913), *cited in City of Yonkers v. Otis Elevator Co.*,

---

15 Anthony Naccarato, who negotiated modifications to the Master Agreement with MMP, on behalf of employers other than MTL, in the summer of 1982, understood this principle. *See* Naccarato Dep. 39-40 (stating that neither MMP nor the employers agreeing to modifications could change the terms of the modified agreement "without mutual agreement").

649 F. Supp. 716, 733 n.21 (S.D.N.Y. 1986), *aff'd*, 844 F.2d 42 (2d Cir. 1988); *see also Republic Aviation Corp. v. Republic Lodge No. 1987, Int'l Ass'n of Machinists*, 10 Misc. 2d 783, 793, 169 N.Y.S.2d 651, 664 (Sup. Ct. 1957) ("Disclosed intent, not some undisclosed subjective intent or understanding, controls contractual relationships.").

Various MTL witnesses testified that they also understood at the time the modification was agreed to that the Master Agreement's unmodified terms being applied to the Sealift vessels up until June 15, 1984 would not extend beyond that date. However, they never expressed this belief in 1982, not even to one another. *See* Tr. 627 (Murphy testimony) (Murphy never expressed this intention to Lowen); *id.* at 1000-01 (Rand testimony) (Rand never expressed this intention to Lowen); *id.* at 999-1000 (Rand testimony) (Rand never expressed this intention to Murphy). Moreover, the court finds that MTL officials were simply not credible on this point, just as they were not credible on other critical points relevant to this litigation. The court also notes that the evidence is clear that MTL did not approach the 1982 negotiations with MMP or the Navy coolly, cautiously, and systematically, but rather acted hastily, and with great informality. MTL may even have made a false statement to the Navy. *See* discussion *supra* at 12 & note 5. Indeed, MTL realized after the Navy Contract extension had been agreed to that it had made an error that would cost the company over one-half million dollars, but for the Navy's sympathetic benefaction. *See* discussion *supra* Background Part F. Lastly, this court cannot allow MTL to pick and choose when it will accept Lowen's unexpressed intentions, and when it will not.

MTL presents a sub-argument that Lowen's attempt to automatically renew the Sealift Agreement by his June 13, 1984 letter, *see* Px 19, demonstrates that everything except the specifically negotiated terms of the Sealift Agreement expired on June 16, 1984. This letter is a dubious predicate for such a claim, since it was a legal nullity. Because section I(1) of the Master Agreement was incorporated fully into the Sealift Agreement, MTL had until sixty days prior to May 7, 1985 to serve a notice of intent to renegotiate, amend, or terminate the

Sealift Agreement. When the June 13, 1984 letter was written, MTL's time to indicate such intent had not in fact expired.

The same principle defeating MTL's first argument, that modification requires mutual consent, serves to refute its second argument. MTL points to the prior history of MMP-MTL collective bargaining and the Navy Contract, and argues that after the parties modified the manning provision contained in the 1972-'75 Master Agreement, allowing MTL to secure the original Navy Contract, *see* discussion *supra* Background Part A, the parties still negotiated entirely new Master Agreements in 1975, 1978, and 1981. All this evidence demonstrates is that a modified contract may be modified a second time. Indeed, this past history actually demonstrates the principle applicable here. When new Master Agreements were entered, they incorporated the unmodified term of the manning provision of the Navy Contract.

MTL's third argument relies on a comparison between the oral modification entered between itself and MMP and written modifications MMP entered in 1982 with other employers. In those written modifications, MMP and the employers expressly agreed that "[a]ll provisions of the [Master] Agreement not specifically modified or waived herein shall continue in force and effect." Px 72 at § III(6); Px 73 at § III(6); Px 74 at § III(6). MMP had the same intent in entering all of the modifications, oral or written—to preserve jobs for its members.

MTL argues that the inclusion of the clauses continuing the unmodified provisions of the Master Agreement in the written modifications shows that Lowen did not intend the unmodified provisions to continue as part of the Sealift Agreement. All that these clauses demonstrate is that those employers acted more cautiously than MTL did. (After all, they did secure *written* agreements.) The applicable controlling legal principle, that unmodified provisions are incorporated into the modified agreement, creates terms that are implied in law. These other agreements merely made such an obligation express. The clauses are, in ultimate effect, as unnecessary as an explicit term that states that the parties agree to carry out their obligations in

good faith and deal fairly with each other.[16] MTL cannot show by the absence of an explicit term in the Sealift Agreement continuing the Master Agreement's unmodified provisions that there was an expressed intent between MTL and MMP to supercede the Master Agreement in its entirety. In this regard, it is immaterial whether Lowen entered those other contracts prior to entering the Sealift Agreement. His "unexpressed thinking," *see* Tr. 492 (remarks of MTL counsel), is irrelevant to discovering the objective agreement these parties reached. *See* discussion *supra* at 44-45.

MTL's fourth argument relies on a line of cases that stand for the proposition that parties may contract to provide that certain obligations continue beyond the termination of the contract itself. *See, e.g., Weimer v. Kurz-Kasch, Inc.*, 773 F.2d 669, 676 (6th Cir. 1985); *Bower v. Bunker Hill Co.*, 725 F.2d 1221, 1222 (9th Cir. 1984); *International Union, UAW v. Yard-Man, Inc.*, 716 F.2d 1476, 1479 (6th Cir. 1983), *cert. denied*, 465 U.S. 1007 (1984). Thus, according to MTL, MTL and MMP agreed that the particular terms of the Sealift Agreement would survive beyond expiration of the Master Agreement, while its other terms would not.

These cases are inapposite. In each instance, they concern agreements to pay certain benefits accrued by employees during the period of the collective bargaining agreement at a time subsequent to the expiration of the collective bargaining agreement. *See Weimer*, 773 F.2d at 676 (retiree insurance benefits); *Bower*, 725 F.2d at 1222 (retiree medical insurance); *Yard-Man, Inc.*, 716 F.2d at 1479 (retiree insurance benefits); *see also John Wiley & Sons v. Livingston*, 376 U.S. 543, 552-55 (1964) (severance pay, vacation pay, and pension plan contributions). On the other hand, the Sealift Agreement is intended to establish the "wages, hours and working conditions which shall be applicable to the licensed Deck Officers employed aboard the [Sealift] Tankers," *see* Dx 42, *supra* note 11, for the duration of the contract period established by the Sealift Agreement. The

---

16 "[I]n every contract there exists an implied covenant of good faith and fair dealing." J. Calamari & J. Perillo, *Law of Contracts* § 11-38(b) at 509 (3d ed. 1987) (quoting *Kirke La Shelle Co. v. Paul Armstrong Co.*, 263 N.Y. 79, 87, 188 N.E. 163, 167 (1933)).

Sealift Agreement does not defer or extend payment of particular benefits.

MTL's fifth and last argument, to which the parties devoted a substantial amount of court time, derives from the fact that after the Sealift Agreement was reached, on January 1, 1983 and again on January 1, 1984, pursuant to the Master Agreement, MMP notified MTL that the rate of contribution for the MMP Health and Benefit Plan must be raised, and MMP demanded and received higher compensation. MTL offered this evidence to rebut the Union's claim that MTL had agreed, during the course of the negotiations in 1982, to "lock in" all items listed on Schedule A. The Union by that claim hoped to buttress its argument that the entire Master Agreement was incorporated into the Sealift Agreement.

The court agrees with MTL that MMP agreed only to commit to wage reductions. *See* discussion *supra* at 36-37 & note 14. Accordingly, this line of contention and proof is irrelevant to the outcome of the action. As the Sealift Agreement necessarily incorporated all provisions of the Master Agreement which were not inconsistent with its modified terms, it was entirely appropriate that MMP demand that MTL pay the increases in this rate that occurred as dictated by the Master Agreement. The provision in the Master Agreement covering the health and benefit rate continued to be applicable to the Sealift vessels because the parties did not modify it.

In conclusion, it appears unequivocally that the parties did abide by the Master Agreement, as modified by the particular wage and benefit items of the Sealift Agreement, except for its term of duration, for the period January 1, 1983 to June 15, 1984. The court concludes that the parties intended that the Sealift Agreement extend the entire Master Agreement (as modified by the Sealift Agreement) with respect to the Sealift vessels until May 7, 1985. In accordance with the court's Order filed December 22, 1986, all remaining issues are committed to arbitration.

Although the general issue of escalation and MTL's specific right to collect payment from the Navy for the 1983 and 1984

increases in MMP's health and benefit rates[17] has been found to be immaterial to the resolution of this lawsuit, discussion of the issue at some length is warranted, because the court's broader credibility determinations are based in some measure upon the testimony offered on this issue.

The original Navy Contract contains an article entitled "Escalation." *See* Dx 15 Art. 31. That section required the Contractor, MTL, to submit a Schedule A showing labor costs on March 1, 1974. *See id.* Art. 31(a). Escalation would occur under the following circumstances:

> In the event that after 1 March 1974 the Contractor, as a result of collective bargaining agreements, or as a result of a change in the composition of the tankers' crews or the special maintenance riding crews, shall be required to pay *total wages* to the special maintenance riding crews or to the complement of the tankers in excess or less than those shown in Schedule A, for the period commencing upon the effective date, payment will be made by the Government or credits by the Contractor for adjustments upward or downward during that period, not less frequently than every three months.

Id. Art. 31(d) (emphasis added); *see* discussion *supra* at 14-15 (definition of "total wages"). As stated by P. Allen Benson, MTL's manager of fleet accounting, *see* Benson Dep. 5, "the difference in [the base Schedule A and the current Schedule A] was the amount of money billed under escalation." *Id.* at 11; *accord*, Tr. 922 (Brunkhorst testimony); *see, e.g.*, Dx 18. Article 6(k) of the Navy Contract states that "[a]ll renewals or *modifications* of labor agreements negotiated by the Contractor covering the operation of the tankers under this Contract

---

17 The National Maritime Union's health and benefit rate increased as well. *See* Tr. 930; Px 36. Also, MTL actually paid approximately twenty-six thousand dollars more in 1983 and 1984 (until June 15) to the health and benefit plans of its other two unions with members working on the Sealift vessels than it would have if the health and benefit rates of those other two unions had been held "firm." *See* Px 36.

shall be binding on the Government." Dx 15 Art. 6(k) (emphases added).

Karen Brunkhorst, MTL's assistant manager of vessel accounting, Tr. 915, testified that until March 1983, MTL submitted a revised Schedule A to the Navy "whenever the crew complement changed, whenever the base rate changed, and generally if there was a large change in any of the calculations we made to a benefit plan or if something other major changed." Tr. 924; *see id.* at 963 (Rand testimony) (Navy Contract "requir[ed]" MTL to provide MSC with revised Schedule A "each time there was a material change in" MTL's costs, especially those resulting from new contracts with MTL's labor unions, which "required approval by the Navy"). Brunkhorst, however, also testified that MTL was required to submit a revised Schedule A in situations "when the *base wages* changed," *see* Tr. 924 (emphasis added), not, as stated in Art. 31(d), when "total wages" changed. *See* Dx 15 Art. 31(d) (quoted in discussion *supra* at 51).

It is uncontroverted that from March 1, 1983 to May 7, 1985, MTL did not submit any revised Schedules A to the Navy. *See* Tr. 922 (Brunkhorst); *id.* at 938-39 (same witness); Benson Dep. 39. The reason for this is the commitment MTL gave to the Navy in the 1982 negotiations between MTL and the Navy. The November 12 letter, referring to two alternative Schedules A being submitted with that letter, states that "[b]oth *sets of figures are firm* for the option period 1983-1985." Dx 2 at 1 (emphasis added). On November 15, MTL's Capt. Downing sent a telex to MSC stating that "Schedule A, delivered with our letter [dated] 12 November 1982, *is firm* through May 1985." Dx 5 (emphasis added). On November 22, MTL sent MSC a letter notifying the Navy, pursuant to Article 6(k) of the Navy Contract, that "[a]ll of the unions have agreed to *hold total compensation levels firm* through May 7, 1985." Dx 6 at 2. As a result of MTL's commitment, the Navy was able to compute to "a fair degree of certainty" the Contract Price of extending the Navy Contract with MTL until May 7, 1985. *See*

Dx 14 para. 3(a).[18] The Navy then calculated a per diem cost for the entire two year period of the extension. The per diem cost included the base Contract Price, "*Escalation of Total Wages*, Subsistence and Stores," and Crew Overtime. *See id.* para. 7 & NOTE (emphasis added). The Navy knew, because Schedule A would be held "firm," the absolute cost of escalation over the two years.

When the Navy confirmed the extension of the Navy Contract, it sent MTL a letter of "essential points of understanding and agreement." *See* Dx 8. This letter specifically stated: "It is understood this Revised Schedule A *will remain firm* from 1 January 1983 through May 1985." *See id.* at 2 (emphasis added). Rand testified that MTL committed itself not to submit any more Schedules A for the period January 1, 1983 until May 7, 1985. *See* Tr. 992.[19]

On July 5, 1983, Rand, on behalf of MTL, executed Amendment No. 19 to the Navy Contract. *See* Dx 15 Bates stamp ##100478-100481. Amendment No. 19 contained the modifications agreed to in the 1982 negotiations between MTL and the Navy. Paragraph 4 stated various changes to Article 31(b) of the Navy Contract, which defines the terms "total wages," "stores," and "subsistence." *See* Dx 15 Art. 31(b). Paragraph 4(c) of Amendment No. 19 stated: "Effective 1 March 1983, the Revised Schedule A per diem rate for each tanker is $5,008.63 for the period 1 March 1983 through 6 May 1985." *See id.* Bates stamp #100480. The figure $5,008.63, which cannot increase, is derived by taking the yearly total for all the figures on Schedule A-2 submitted with the November 12, 1982 letter, $1,828,151.24, *see* Dx 2, and dividing that total by 365 to arrive at a daily figure. *See* Dx 29 ("Wages Escalation Based on Revised Schedule 'A' Effective March 1, 1983"). Thus, from

---

18 The Contract Price could not be computed with complete accuracy because the Navy did not possess the necessary January 1983 figures in November 1982. *See* Dx 14 para. 3(a).

19 Because of the problem with foreign articles, *see* discussion *supra* Background Part F, the Navy allowed an amendment of the extension "changing the date of implementation of reduced wages from January 1, 1983 to the termination of existing foreign articles." Dx 13.

March 1, 1983 through May 6, 1985, MTL could recoup, under the escalation provision of the Navy Contract, the difference between the revised Schedule A ($5,008.63) and the base Schedule A ($2,857.84). *See* Dx 29. This figure is $2,150.79 per ship per day. *See id.*

The health and benefit rate for all MTL's unions was a constituent element of Schedule A. *See* Tr. 904 (testimony of Biago Perillo, MTL payroll department manager—*see* Tr. 891). The health and benefit rate was also part of what the Navy considered "total wages." *See* discussion *supra* at 14-15 (definition of "total wages"). The figure of $5,008.63 includes a calculation for MTL's daily contribution to MMP's Health and Benefit Plan.

On January 1, 1983, there was an increase in the MMP health and benefit rate, dictated by the Master Agreement, and on January 1, 1984, another increase occurred. Counsel for MTL called these rises, collectively, "dramatic[ ]." *See* Tr. 1227. These increases are reflected in certain charts MTL prepared for trial. Between January 1, 1983 and June 15, 1984, MTL contributed $541,058.70 above what it would have if the health and benefit rate of its four unions had remained at the rate that MTL had included with the Schedule A that was "firm." *See* Px 36 chart 4.[20] The figure for MMP alone was $194,350.15 above what otherwise would have been paid by MTL.

It is now necessary to turn to the billing practices of MTL relating to the Navy Contract. Beginning with the original Navy Contract, MTL billed the Navy for four categories of costs. First, MTL billed a "bimonthly contract price invoice." *See* Tr. 918. This contained the Contract Price (the basis for escalation) paid by the government, and certain overtime calculations. *See id.*; *see also* Benson Dep. 9. Second, MTL recouped its further actual labor costs by submitting a "wage escalation invoice." *See* Tr. 918-19; Benson Dep. 17-21. Third, MTL billed for escalation in subsistence and stores. *See* Tr. 918; *id.* at 919. Finally,

---

20 Chart 4 speaks of Schedule A-1. This refers to Schedule A-1 submitted with Rand's November 12, 1982 letter, Dx 2 or Px 29. *See* Tr. 903. This does not alter the calculations of additional health and benefit plan payments, because there is no difference in the Schedule A-1 and Schedule A-2 figures for this labor cost. *See* Dx 2; discussion *infra* in the text at 66-68.

MTL billed for "assorted kinds of pass-through billings." Tr. 918. This included, *inter alia*, "overtime for items that were entirely within the[ ] [Navy's] control." *Id.* at 921.

The wage escalation invoice was a monthly invoice. *See id.*; Benson Dep. 11. With this invoice, MTL recouped the increase in the actual labor costs above the 1974 Schedule A (the difference between the current Schedule A and the base Schedule A). *See* Tr. 923. "Labor costs" includes all the figures on Schedule A, including pension, and health and benefit. *See, e.g.*, Dx 18; Dx 19; Dx 20; Dx 21.

MTL pointed out that the Navy did in fact reimburse MTL for the increased payments MTL made as a result of the rises in MMP's (and the National Maritime Union's) health and benefit rates, as well as increased payments made to the other unions' health and benefit plans, *see* discussion *supra* note 17, occurring *after* the Navy exercised the option to extend the Navy Contract. *See, e.g.*, Px 37; Px 38; Px 39; Px 40. Nevertheless, the circumstances of that reimbursement are peculiar. Furthermore, there was inconsistent and evasive testimony presented by MTL on the subject.

There are two unusual circumstances associated with the reimbursement by the Navy of the increased health and benefits payments MTL was making. First, MTL waited a full year before submitting the first invoice seeking reimbursement. Second, MTL created an entirely new invoice to recoup these sums.

MTL did not include the increases in health and benefit payments over the rates contained in Schedule A-2 on the wage escalation invoices being submitted monthly to the Navy; *see* Tr. 923; *id.* at 939, despite the fact that the wage escalation invoices included a bill for the health and benefit payments as they appeared in Schedule A-2. *See* Dx 2 & Dx 29. Instead, MTL submitted these increases through separate "wage escalation (adjustments)" invoices. *See, e.g.*, Tr. 923; Px 37; Px 38; Px 39. The form MTL used was "very similar to the wage escalation invoice and it was adapted for this kind of billing." Tr. 943. Brunkhorst testified that it would not be possible to include these increases in the health and benefit rates on the monthly wage escalation invoices MTL was sending the Navy

> [b]ecause that is not the way the wage escalation invoice is to be calculated. That is a specific invoice that is in the billing examples that goes with the contract and the form must be followed. We cannot just change the form to fit our needs.

Tr. 942-43. The court fails to see how a change in figures would alter the "form" of the wage escalation invoice. However, such a change would, it seems, change some of the dollar figures on the invoice. Because the per diem escalation figure of $2,150.79 could not increase between March 1, 1983 and May 6, 1985, *see* discussion *supra* at 54-55; Dx 29, the monthly wage escalation invoice could only reflect certain figures—the number of ships multiplied by the number of days in service. It appears from MTL's "wage escalation (adjustments)" invoices that it was MTL's practice to calculate a monthly debit total, and then calculate separately any credits for items such as vacation or days when any of the ships were being overhauled. *See* Px 37. If that was MTL's practice with respect to the wage escalation invoices, then the wage escalation invoice would have to reflect, somewhere, one of three figures after March 1, 1983: $541,999.08 ($2,150.79 x 9 (ships) × 28 (days in February)); $580,713.30 ($2,150.79 x 9 x 30); or $600,070.41 ($2,150.79 × 9 × 31). Inclusion of the changes in MTL's payments to the health and benefit plans would produce different numbers.

Curiously, MTL did not bill the Navy in February, 1983 for the increased cost it had incurred in the health and benefit payments in January, 1983. In fact, it was not until February 10, 1984 that MTL sent MSC one of these "wage escalation (adjustments)" invoices. *See* Px 37. The February 10 invoice covered the entire year of 1983. *See* Tr. 940; Px 37. Brunkhorst had no valid explanation for this twelve-month delay in billing:

> Q. It was not in the company's interest to wait a whole year before billing for monies that it actually sent out, isn't that right?
>
> A. It depends if something else was going on at the time, something maybe of greater monetary importance.

Q. Is it your understanding that this delay with respect to the submission of [the February 10 invoice] was because of something else that was going on at that time?

A. It's very possible.

Q. Do you have some knowledge of that or are you just speculating?

A. Items that were billed to the government were billed, of course, on a dollar amount priority, but they were also done based on what was currently going on. We did a lot of catch-up billing during that time. We had extreme concentration on billing the Navy for past overtime pass-through billings. We did go through—well, cadets became billable at that time and we had to retroactive [sic] bill back through I believe 1979 to invoice the Navy for those. So that might have taken priority over something else.

. . . .

Q. But is it true that after this first one was sent they were sent on a quarterly basis, is that right?

A. That at is true.

Q. Was there a difference in priorities that explains why they were sent on a quarterly basis?

A. It's possible.

Q. Are you aware of any?

A. Things change in any department.

Tr. 942, 944. Rand attributed the delay to somewhat different reasons.

Q. Do you know why it took 14 [sic] months for MTL to send the bills to the Navy?

. . . .

A. I believe that at that time we were either just in the process or had just—we were in the process of preparing for or had just completed a physical move of the company or a physical change in our computer hardware. I know there were 2 instances in this general time frame

where we had a lot of accounting problems, particularly in our billing section, and some bills just did not go out.

Q. And that accounts for the 14-month [sic] lapse in sending the increased costs over to the Navy?

A. I believe that's correct. That is my recollection.

Tr. 1102.

Brunkhorst also stated that "the necessary back-up documentation" to complete the wage escalation (adjustment) invoice varied from that used to calculate the wage escalation invoices that MTL was sending out monthly. *See* Tr. 943. However, looking at Px 37, it is obvious that this "back-up documentation" provided figures that were used in basic mathematical calculations. *See id.* There is no indication in the record that MMP withheld from MTL the per diem rates MTL would need to make these calculations for any period of time. Rather, as the questioning at trial indicated, MMP demanded payment immediately. *See* discussion *supra* at 58-59.

Brunkhorst also testified that MTL was *not required* to submit a revised Schedule A if there was a "large change in any of the contributions [MTL] made to a benefit plan," but did so anyway, as if doing so was merely a courtesy to the Navy. Tr. 924. This testimony is not consistent with the Navy Contract, which requires the Contractor to submit "[a]ll modifications of labor agreements." *See* Dx 15 Art. 6(k). Further, it is inconsistent with the fact that the benefit plan figures were part of Schedule A-2, the daily figure of which could not increase after March 1, 1983. Any increase in the contributions to any plan would change these figures. The court also notes that on July 1, 1981, MTL submitted a revised Schedule A that differed from the Schedule A submitted just two weeks earlier, on June 16, 1981, only in the figures for "Pension & Welfare" and "Feinberg Award." *Compare* Dx 18 (June 16, 1981 Wages Escalation Based on Revised Schedule A) *with* Dx 19 (July 1, 1981 Wages Escalation Based on Revised Schedule A).

Although Brunkhorst stated that she was "responsible for all payables, all receivables, [and] all cash receipts" for MTL, and that the people who prepare the bills submitted to MSC for the

Sealift tankers worked "directly for" her, *see* Tr. 916, she took pains to point out that she did not prepare the wage escalation (adjustment) invoices. *See* Tr. 938 ("It was not my job, it was someone who worked for me. They did it, yes."); *id.* at 941 (Brunkhorst had no part in cutting the February 10 invoice, "other than to know of its existence and make sure the secretary typed it and it went out on a timely basis"). She never inquired prior to February, 1984, why MTL was not billing the Navy for these costs. *See* Tr. 940. Nobody told her that such a bill should be prepared. *See* Tr. 941. *But see* Tr. 945 ("Q. You were simply told that such a payment had been made and that the Navy should be invoiced for it[?] A. Yes."). Her boss, Benson, instructed a contract specialist to bill the item, and Brunkhorst did not ask why this had not happened sooner. *See* Tr. 941. She could not state when Benson gave this instruction. Tr. 945.

Benson, the manager of fleet accounting, gave some equally puzzling and evasive answers in his deposition. Referring to these increases in the health and benefit rates, MMP's counsel asked Benson:

> Q. Do you know the magnitude of the welfare increases?
> A. No.
>
> Q. How were you aware that there were increases?
> A. I just know.
>
> Q. Did somebody tell you that?
> A. I billed the Navy for increases. I just know. I don't know where they came from.

Benson Dep. 41-42. Even with the benefit only of the cold written transcript, it is apparent that Benson was very anxious about this subject:

> Q. . . . You said that no one in your office calculated what the increases were, and I am trying to find out how the increases got transmitted to the Navy in the form of a bill from MTL?
> A. My department made no calculations. We obtained letters from the union stating the rates. These rates were passed on to the Navy in additional bills.

Q. Well, let's—
A. Am I—
Q. Let's assume—let's not assume anything.

[MTL counsel]: Do you want to talk to me about something?
THE WITNESS: Not really, no.

. . . .

Q. You also said that there were some increases in payroll taxes between the period March 1 of '83 and May 7 of '85. Who was responsible for calculating those payroll tax increases?
A. See, I don't understand your indication. We don't calculate increases, benefits or payroll taxes. I don't know who does that calculation, either the union or the government.
Q. All right. Let me try it another way.

THE WITNESS: I think we should talk a second.
A. [MTL counsel]: Why don't we just take a break. Off the record.

Benson Dep. 43-44. After conferring with counsel, Benson amended his answer to indicate that "[m]y department would take the information obtained from the appropriate [rate], calculate the difference in the rates, the increase up or down, and cut an increase [sic] to the Navy for that difference." Benson Dep. 44.

Benson claimed that he telephoned the Navy to discuss how to pass on to the Navy the welfare cost increases, *see id.* at 46-47, and was prompted to call the Navy because he "realized that there were increases of various fringe benefit rates," *id.* at 48, even though no person at MTL ever told him that the Schedule A effective March 1, 1983 could not be amended or changed. *See id.* at 54-55. Benson could not remember who he spoke with at the Navy, *see id.* at 47, nor when he spoke with the person. *See id.* Benson could not even recall "what time of year" he made the call. *See id.* He evaded answering counsel's question seeking the name of the person at the Navy Benson

asked to speak to, *see id.*, and he did not receive any explanation as to why it would not be necessary to submit a revised Schedule A. *See id.* at 48. It is also curious that Benson would assume this responsibility, because he testified to the following:

> Q. Who in your office would be responsible for preparing those revisions and sending them to the Navy? When I say revisions, I mean to Schedule A.
> A. My billing specialist.
> Q. *Is there anybody above a billing specialist who would determine when a revised Schedule A had to be submitted to the Navy*?
> A. *No.*

Benson Dep. 46 (emphasis added). Benson claimed that he called the Navy because it was "a pain" to revise Schedule A, and that he did not believe it was necessary. *See id.* at 48.

Benson claimed he was under the same impression as Brunkhorst as far as when it was necessary to submit a revised Schedule A:

> Q. . . . [D]id anyone at the Navy tell you under which—under what circumstances revised Schedule As did have to be submitted?
> A. I don't know.
> Q. Did you have any understanding of your own with respect to when revised Schedule As had to be submitted?
> A. Yes.
> Q. What was that understanding?
> A. That the only time a revised Schedule A had to be submitted was when the complement of the crew was changed, or the wages were changed.
> Q. What do you mean by wages.
> A. What the man gets in his pocket.
> Q. *Base wages*?
> A. *Yes.*

Q. Suppose there were an increase in the pension rate or the vacation rate; was it your understanding that a revised Schedule A would not have to be submitted?

A. It was.

Q. What was that understanding based on?

A. I don't know.

Benson Dep. 50 (emphasis added). Benson's understanding conflicts with the requirement of Article 6(k) in the Navy Contract that all modifications of labor agreements that would change Schedule A be submitted to the Navy for approval.

Another witness for MTL, Michael Berkowitz, gave plainly incredible testimony on the subject of escalation. In his deposition, Berkowitz was asked about the November 12 letter, which he authored. Specifically, Berkowitz was asked what he meant when he stated that "[b]oth *sets of figures* are firm for the option period 1983-1985, and we have our unions' agreement for the *lower wages* during the period." *See* Dx 2 (emphases added). Berkowitz replied:

> What we were saying at that time, was that MTL was prepared to commit to the figures that were attached which means that we would hold firm *and not hold the Military Sealift Command responsible for increases, such increases as might occur with respect to the—whatever figures were on [Schedule A]. The distinction being an agreement between us and the Military Sealift Command and what may be different agreements with respect to labor unions, whatever.*

Berkowitz Dep. 14-15 (emphasis added). At trial, Berkowitz recanted this testimony, claiming that

> What we intended to say, or what I intended to say because I wrote it, was that the wages, the bulk of what the Navy had been concerned about over the period was *base wages and vacation* and that when the figures are going to be firm we felt that what they were focused on was the wage items because that is the bulk of what happens.
>
> Most of the other things they weren't concerned about. . . . *[A]ll we felt that we had to say was holding*

> *firm was on the wage items*, and when I say that we have our union's agreement for the lower wages, what I am saying is MTL is being responsible.

Tr. 1122 (emphases added). It is astonishing, and simply not convincing, that a graduate of Harvard Law School, *see* Tr. 1111-12, and a Fulbright Scholar, *see id.* at 1111, would be so inarticulate in the preparation of the text of a crucial letter that he would use the words "sets of figures" to mean "wage items" in the same sentence that he actually used the word "wages." Berkowitz claimed that the November 12 letter was drafted "in some haste," but that it needed no clarification because he "think[s] the[ ] [Navy] fairly well understood" that he meant "wage items" when he said "sets of figures." *See* Tr. 1135.

Berkowitz insisted that pension and welfare rates could rise and be reimbursable from the Navy under the Navy Contract during the period of the 1983-'85 extension even though Schedule A was "firm." Tr. 1123. MTL, he said, had no intention of capping the pension and welfare costs reflected on Schedule A. *See id.* at 1134-35. Under Berkowitz's interpretation, MTL could have submitted revised Schedules A for the increases in health and benefit rates that actually occurred in 1983 and 1984, in a manner similar to its submission on July 1, 1981, *see* discussion *supra* at 60-61, rather than creating the "wage escalation (adjustments)" invoice. Berkowitz's belief that the Navy "fairly well understood" that these items could increase is not consistent with Amendment No. 19 to the Navy Contract. *See* discussion *supra* at 54-55.

The purported explanation for Berkowitz's recantation of his deposition testimony is that at the time of his deposition when he was shown the Schedules A that were attached to the November 12 letter, Berkowitz had "in . . . mind" the handwritten Schedule A attached to MTL's October 26 letter. He claims that his comments regarding what would be "firm" relate only to the handwritten Schedule A. Tr. 1125-26. MTL's counsel "pointed out that he thought I made a mistake and we interrupted the deposition while he took me out in the hall and showed me the 2 letters and I realized I made an error and we went back in and explained to" MMP's counsel. Tr. 1128.

Berkowitz's characterization of this incident is misleading. Berkowitz did not explain to MMP's counsel that only the wage items on Schedule A would be held "firm" after he consulted with his lawyer.

Q. [L]et me show you what has been marked as Exhibit D, a letter dated October 26, 1982 and it has an attachment in handwriting.

A. Yes.

Q. Is that the attachment you were testifying about earlier where you did it in pen?

A. Yes, it is.

Q. Is it now your recollection that that document was attached not to the November 12 letter of Mr. Downing but to an October 26th letter[?]
[MTL Counsel]: Off the record.

. . . .

A. Yes, that is my recollection.

Q. So that it may well be then that what we previously marked as Exhibit C [Schedules A-1 and A-2 attached to the November 12 letter] was attached to the November 12 letter, is that correct?

A. It may be, yes.

Q. You have no recollection that that is what was attached?

A. No.

Berkowitz Dep. 27-28.

The explanation itself is simply unfathomable. The only different figures in the handwritten Schedule A, as compared to Schedules A-1 *and* A-2 of the November 12 letter, are for overtime. This is due to the fact the October 26 Schedule A is based on an overtime percentage of 80, *see* Dx 1, while in Schedule A-1 the overtime percentage is 85, and in Schedule A-2 it is 78. *See* Dx 2. Other than overtime, every figure—basic monthly wage, pension rate, welfare amount, vacation rate and amount, Feinberg award amount, and payroll taxes (except for one figure missing from the handwritten Schedule A)—is exactly the same

on all three Schedules A. The court rejects Berkowitz's explanation.

Like Berkowitz, Rand testified that he was an unskilled communicator to the Navy. In his November 15 telex, he said that "our unions have agreed that the *prices* reflected in our letter [dated] 12 Nov 82 . . . shall be effective as from 01 Jan 1983." Dx 3 (emphasis added). At the trial, Rand insisted that "prices" did not mean every component of Schedule A, but only the wage terms negotiated with the unions. *See* Tr. 1081-83. Like Berkowitz, Rand "believe[s] that the[ ] [Navy] understood" what Rand meant by this term. *See* Tr. 1084. According to Rand, pension and welfare contributions, although a component part of Schedule A, were not included as a "price" reflected in the November 12 letter. *See* Tr. 1083. Neither Rand nor Berkowitz offered any document that stated to the Navy that it was the intention of MTL that only the wage terms included on Schedule A would be held "firm."

Rand also gave contradictory testimony on what was meant when the Navy, in its December 9 letter, Dx 8, said "Revised Schedule A will remain firm from 1 January 1983 through May 1985." *Compare* Tr. 986 ("We would not give the[ ] [Navy] a new Schedule A in substitution or replacement of the one that had been attached to our [November 12] letter and that the numbers on the paper would not change.") *with id.* at 1091 (stating belief that the Navy was prepared to accept increases in costs in all areas beyond the items fixed in the 1982 negotiations between the MMP and MTL). At other points, Rand testified that by "firm" in his November 12 letter he meant that "Schedule A-1 itself, as a basis, as an example for escalation, . . . would not be changed." Tr. 1062. However, "the only items [on Schedule A] that [he] had in mind, that would be fixed to the Navy, for the period of the renewal, were base wage, . . . and vacation plus diesel and automation allowances which are going to be eliminated." Tr. 1060. Again, the position that only wage items on Schedule A-2 could not increase is not consistent with Amendment No. 19 to the Navy Contract. *See* discussion *supra* at 54-55.

This review does not exhaust the contradictory, evasive, and incredible testimony presented in this case by present and

former officials of MTL. It is sufficient, however, to demonstrate why the court finds the testimony offered by these witnesses upon the whole case not worthy of credit. Their self-serving interpretation of the Navy Contract, and their actions regarding it, though not here directly germane because of the legal analysis undergirding the decision and judgment, are, at the least, troublesome. The court notes that while the fact the Navy paid the increases in health and benefit rates MTL belatedly passed along is irrefutable, and these costs exceeded $500,000 up until June 15, 1984, no witness explained the Navy's position as to why it paid these invoices.

CONCLUSION

This matter is referred to arbitration pursuant to paragraph two of the Order filed December 22, 1986. Plaintiff's complaint for declaratory judgment is dismissed with prejudice insofar as it relates to defendant's second counterclaim. Defendant shall submit a final judgment on notice of five days to plaintiff. "Leave is granted to reopen the action should it be necessary to do so to further implement the court's judgment or to enforce any arbitration award. It is intended, however, [that] the judgment to be entered will be final." *Royal Air Maroc v. Servair, Inc.*, 603 F. Supp. 836, 842 (S.D.N.Y. 1985).

SO ORDERED.

Dated: New York, New York
September 29, 1988

KENNETH CONBOY
United States District Judge

APPENDIX C

Judgment of the United States Court of Appeals for the Second Circuit (originally entered, June 13, 1989; corrected and re-entered, October 20, 1989)

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89-7040

Filed June 13, 1989;

Corrected Copy Issued October 20, 1989

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 13th day of June, one thousand nine hundred and eighty-nine.

MARINE TRANSPORT LINES, INC.,

Appellant,

—v.—

INTERNATIONAL ORGANIZATION OF MASTER, MATES & PILOTS,

Appellee.

Appeal from the United States District Court for the Southern District of New York.

Present:

HON. JAMES L. OAKES, *Chief Judge*,
HON. THOMAS J. MESKILL,* *Circuit Judge*.

* Immediately after oral argument, Judge John Minor Wisdom of the United States Court of Appeals for the Fifth Circuit, who was sitting by designation, disqualified himself.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the judgment of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellee.

ELAINE B. GOLDSMITH,
Clerk

BY: /s/ EDWARD J. GUARDARO
Edward J. Guardaro,
Deputy Clerk

APPENDIX D

Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing and suggestion for rehearing in banc (July 31, 1989)

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 89-7040

Filed July 31, 1989

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 31st day of July, one thousand nine hundred and eighty-nine.

MARINE TRANSPORT LINES, INCORPORATED,

Plaintiff-Appellant,

—v.—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES & PILOTS,

Defendant-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by plaintiff-appellant, Marine Transport Lines.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing in DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

BY: /s/ KATHLEEN [ILLEGIBLE]
Kathleen [Illegible]
Deputy Clerk

Supreme Court, U.S.
FILED
NOV 29 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-693

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

MARINE TRANSPORT LINES,
Petitioner,

v.

INTERNATIONAL ORGANIZATION OF
MASTERS, MATES, AND PILOTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
RAYMOND C. HURLEY
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondent

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

3pp

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

No. 89-693

MARINE TRANSPORT LINES,
Petitioner,

v.

INTERNATIONAL ORGANIZATION OF MASTERS, MATES, AND PILOTS,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

---

BRIEF IN OPPOSITION

The petition of Marine Transport Lines ("MTL") raises no issue that warrants the consideration of this Court. As explained by the court below, the sole issue litigated in this case was "a factual dispute" (Pet. A-3) over "[w]hether or not the oral Sealift Agreement was intended to extend the duration of the Master Agreement as applied to the nine Sealift vessels" (Pet. A-6). The union, MM&P (respondent here) contended that the parties to the oral agreement intended such an extension; the employer, MTL (petitioner here) contended that the parties did *not* so intend. The district court, after an eight day bench trial, found that the union had proven "by clear and convincing evidence" that the parties *did* intend such an extension of the Master Agreement. (Pet. A-7).

The court below correctly identified the sole issue on appeal to be whether the district court's findings of fact as to the intent of the contracting parties were clearly erroneous (Pet. A-7):

> The intent of the parties to a contract is, there is little doubt, a question of fact . . . . In a bench trial, the court's findings concerning the intent of the contracting parties will accordingly not be disturbed unless they are clearly erroneous . . . . These fundamental rules frame *the issue* for us in this appeal: Judge Conboy's conclusion that MM&P and MTL intended to extend the duration of the Master Agreement, as well as his findings concerning particular modifications of the Master Agreement, *were findings of fact, and we must therefore affirm these findings unless they are clearly erroneous.* [*Id.* (emphasis added; citations omitted).]

Far from being clearly erroneous, the court below concluded that "[t]he evidence shows without any doubt" that Judge Conboy's findings were correct (Pet. A-8). Having thus affirmed the district court's findings of fact as to the intent of the contracting parties, the court of appeals concluded that none of the legal arguments pressed by MTL—the same arguments MTL seeks to raise in this court—need be, or should be, addressed in this case.

There is nothing in this purely fact-based decision that could possibly warrant this Court's attention.

Respectfully submitted,

MICHAEL H. GOTTESMAN
(Counsel of Record)
ROBERT M. WEINBERG
RAYMOND C. HURLEY
BREDHOFF & KAISER
1000 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 833-9340
Attorneys for Respondent